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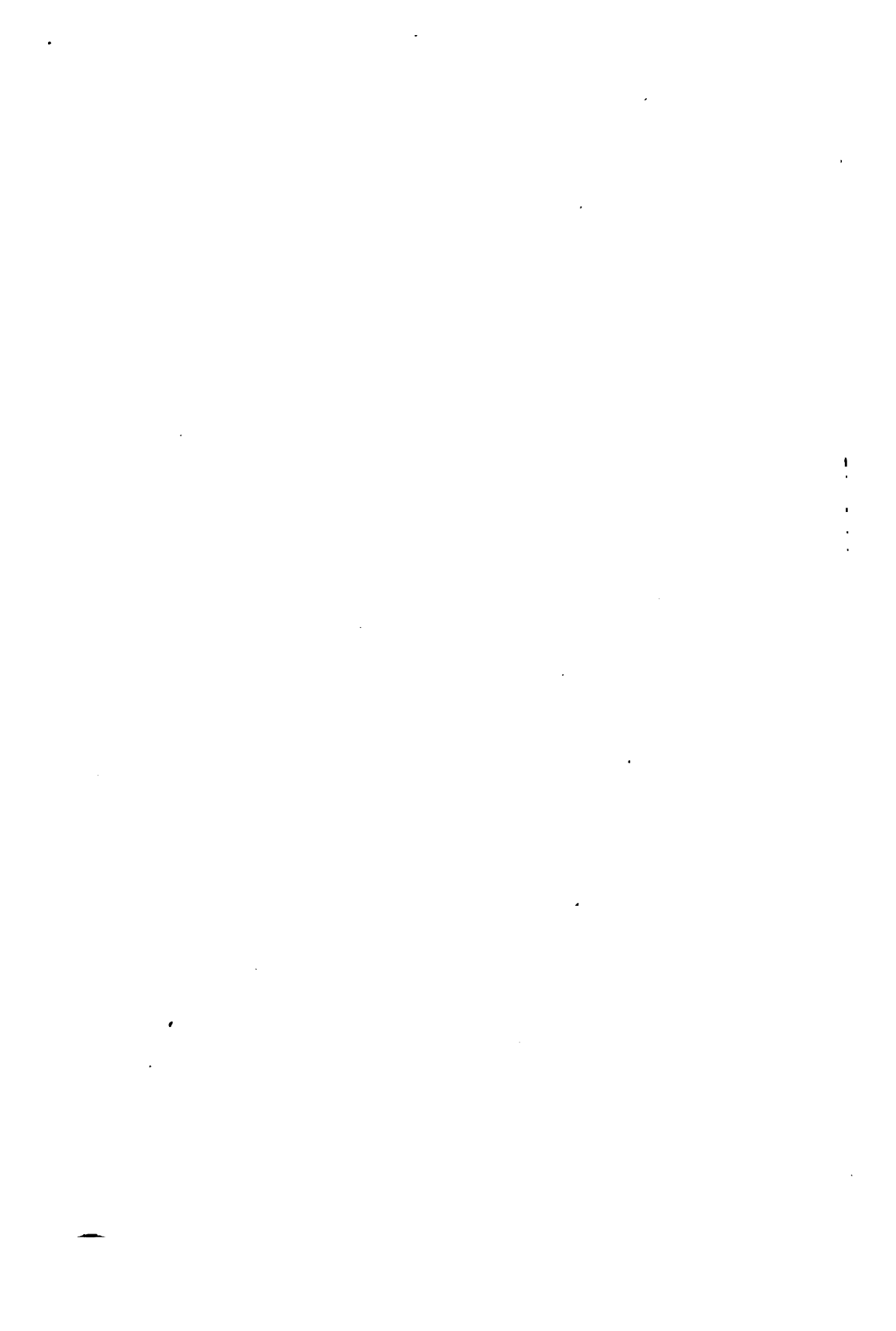
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LEADING CASES
OF THE
COURT OF CIVIL APPEALS
OF THE
STATE OF TENNESSEE
WITH
SYLLABI AND NOTES

By
JOSEPH C. HIGGINS
Associate Justice

VOL. VI.

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LEADING CASES
ARGUED AND DETERMINED
IN THE
COURT OF CIVIL APPEALS
OF THE
STATE OF TENNESSEE

STATE OF TENNESSEE V. J. S. ANDERSON.

1. **INJUNCTION.** *Chancery practice. Appeal from decree dissolving injunction.*

Where a permanent injunction is the sole relief sought by a bill, and where a preliminary writ had been issued and kept in force during the preparation of the cause for hearing and to date of hearing, an appeal from the decree dismissing the bill and dissolving the injunction operates to revive the injunction pending the appeal; and this is so notwithstanding specific adjudication that the injunction should stand dissolved.

2. **SAME.** *Contempt. Jurisdiction of Appellate Court.*

In such case the Appellate Court has jurisdiction to punish for contempt consisting of disobedience of the injunction.

3. **SAME.**

And this power may be exerted by the Court in session, although not sitting at the time in the division which the original cause is to be disposed of.

State of Tennessee v. Anderson.

4. INJUNCTION RESTRAINING PERSONAL CONDUCT. *Equity jurisdiction. Restraining party from exercising a privilege without license. The practice of medicine.*

A Court of equity has jurisdiction upon bill filed by the attorney general to enjoin an unauthorized and incompetent person from practicing medicine in this State when it is averred and shown that neither the medical boards nor criminal Courts of the State could check the defendant and there was no other remedy for the illegal course, especially where it is shown that the defendant carried on his occupation in such a way as to become a nuisance.

5. PRACTICE OF MEDICINE. *A privilege.*

The governing forces have the right and it is their duty to prescribe the qualifications of those admitted to the practice of medicine; and the attorney general acting for the sovereign may appeal to a Court of equity to protect the people against incompetents and fakers.

6. PRECEDENTS. *The day for making not over.*

The power and right of making precedents did not belong exclusively to our forebears.

FROM ROANE COUNTY.

Application for writ of attachment for contempt.

F. M. THOMPSON, Attorney General; JOHN S. McNUTT and BENJ. H. LITTLETON, special counsel for the State.

JAMES G. SHARP, STAPLES & SCOTT, O. M. TINDELL, JNO. M. DAVIS and W. M. HOLLAND for Defendant.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

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IN February, 1915, the Honorable Frank Thompson, Attorney General for this Commonwealth, filed a bill in his official capacity as representative of the public against one J. S. Anderson, averring in substance that the said Anderson was receiving and treating patients and selling remedies and otherwise practicing medicine in Roane County, Tennessee, without having a license therefor and without having submitted to the examination prescribed by our legislative Acts as a condition precedent to the practice of medicine; and also that Anderson had erected at Kingston a sanitarium in which patients were received and cared for, and that this institution was constructed and conducted in such a way as to become a nuisance. It was also alleged that Anderson was repeatedly, persistently and wilfully violating the law and defying the medical laws and authorities of Tennessee and was so conducting himself as to become a nuisance, to the endangering of the health, peace and good order of the State. It was also averred that the people of the locality in which he carried on his practice were much in sympathy with him, so much so that the constituted authorities were powerless to deal with him through the criminal courts and other remedies, and that an appeal to a Court of equity for redress of the grievances of the people was absolutely necessary. An injunction restraining Anderson from practicing medicine and running a sanitarium during the pendency of the litigation was prayed for, and it was sought as the sole and final relief to have this injunction made perpetual.

Chancellor Kyle granted the temporary injunction as prayed for in the bill. Defendant immediately answered as well as demurred and entered his motion for a dissolution of the injunction. This motion was disposed of by the Chancellor on the 3rd day of March. It was his conclusion that the injunction should remain in force, and he

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accordingly so decreed. This injunction remained in force until the 16th or 17th of June succeeding, at which time it was dissolved in the manner to be hereinafter noted.

Somewhere about the 15th or 16th of June, the dates in the transcript now before us being somewhat confusing, the cause came on for final hearing in the Chancery Court at Kingston. The Honorable John W. Staples acted as special Chancellor, the regular Chancellor being absent. A jury had been demanded and some issues of facts are recited to have been submitted to them. During the pendency of the trial, defendant renewed his motion to dissolve the injunction, this motion at last taking the form of a challenge of the jurisdiction of the Court to entertain that part of the bill seeking to restrain him from practicing medicine and demanding dismissal of that portion of the bill and dissolution of the injunction for lack of power in the Court to grant such process. The learned Special Chancellor was of the opinion that this position was sound. He accordingly decreed that so much of the bill as sought to restrain Anderson from practicing medicine was beyond the jurisdiction of the Court and dismissed the same and dissolved the injunction. On this or a succeeding day, one or two removed, complainant requested the Court for permission to amend his bill so as to strike therefrom all reference to the maintenance of the sanitarium by Anderson. This was granted with the consequence that every feature of the bill other than that seeking an injunction against the defendant's practice of medicine was eliminated; and it being apparent on the record that this part of the bill had been dismissed by the Court, there was nothing left for litigation. The Attorney General thereupon prayed and perfected his appeal to this Court. While the exception and prayer was to the action of the Court in dismissing the bill and dissolving the injunction restrain-

ing the defendant from practicing medicine, we must treat the prayer as for a broad appeal.

The Chancellor in dissolving the injunction consequent upon his dismissal of the bill for an injunction against the practice of medicine recited that his order to this effect was an interlocutory one, entered before the final termination of the case. The Chancellor also appended or consented to have appended to the granting of the appeal a direction that a temporary injunction which had been dissolved by him a day or two prior to the final decree should stand dissolved pending the appeal.

At an early day of the present term complainant appeared before this Court and prayed that writ of attachment issue for defendant and that he be brought before this tribunal to show cause why he should not be dealt with for contempt in continuing the practicing of his profession in violation of the injunction which was issued and in force upon the day that that particular portion of the bill was dismissed and the injunction dissolved. Writs of attachment accordingly issued, when defendant was arraigned at the bar of this Court he demurred to the contempt proceeding and declined to file a sworn answer or to controvert the issues of the petition. So that we are left to deal with questions of law only. We must assume that defendant has continued to follow his profession in receiving and treating patients and to this Court.

The right of this Court to deal in the premises is vigorously assailed by able counsel for defendant, and because of this and the somewhat novel aspect of the questions we have given the subject careful consideration. The brevity of our treatment may not be commensurate with our deliberations of the questions. But we think a brief statement of our position upon all the points raised will

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suffice for disposition of this preliminary question. The main proposition is pending before us upon appeal.

I. It is first urged that the dissolution of the injunction in this case by the interlocutory order; and the general rule denying the right to appeal from such order is relied upon. It is also insisted that there was no appeal from this order and that the appeal which was finally taken was not effectual to bring up the dissolving order for review. We are constrained to take the opposite position. We are of opinion in the first place that the recitals of the action of the Court in connection with the dissolution of the injunction clearly made the order of the Court a final decree and not a mere interlocutory order dissolving the injunction. If the injunction had been simply dissolved, there would be much ground for defendant's contention. But as the Court held that it had no jurisdiction upon this feature, the dissolution of the injunction was, of course, a dismissal of the bill. Now when all other parts of the bill were dismissed by complainant the effect was to make the order dissolving the injunction the final decree. No other conclusion can be drawn if we look to substance. It must be recalled that the several entries were made at the same term.

II. It is contended that the injunction was dissolved by the Chancellor pending the appeal and that this justified the defendant in pursuing his profession unhindered; and it is urged that an appeal to this Court did not reinstate the injunction. We are of the opinion that the contrary universal rule is that an appeal in an equity cause puts an end to the jurisdiction of the lower Court and transfers the litigation to the appellate tribunal. Citations supporting so plain a proposition are not needed. It is equally true that an appeal annuls every part of the

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decree and revitalizes all the processes issued and make writs and orders the processes and commands of the Appellate Court. It is manifestly true that if the injunctive process is the sole relief and if a temporary injunction has been granted and is in force at final hearing, an appeal reinstates the injunction and makes it the injunction of the Appellate Court. Of course, there may be cases, where the lower Court commands the doing of something or restrains conduct during an appeal. But this does not destroy the efficacy of the rule revitalizing or continuing an injunction: *Foley v. Leath*, 3 Shannon's Cases, 358; *Gibson's Suits*, 2 Ed., Sec. 849; 3 C. J., p. 1280; 6 R. C. L., 508; *Barnes v. Typographical Union*, 14 L. R. A. (N. S.), 1150; *Hubert v. Cement Company*, 38 L. R. A. (N. S.), 439; *Merrimack Bank v. Clay Center*, 219 U. S., 527, 55 L. Ed., 320, and note.

See, also, our own cases to the effect that an appeal vacates every order made by the Chancellor and brings up the whole case for review; and further that all steps desired after the appeal must be taken in the Appellate Court: *Norton v. Barnes*, 2 Lea, 610, and others.

III. But it is said that this is an Appellate Court only and that it has no jurisdiction to examine witnesses, and it is thence argued that no judgment of contempt can be pronounced. This position is also unsound. The contrary was established if it ever doubted by the recent case of *State v. Hebert*, 127 Tenn., 220, opinion by Chief Justice Neil. See also the foregoing citation as lending the strongest support to the proposition that Courts of appellate jurisdiction do have the power. We believe that a sufficient answer is to be found in our statutes providing for contempt punishments. The power to punish cannot be denied if the injunction be treated as the process of this Court;

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and this we have so held. This power is inherent in Appellate Courts as well as in lower Courts. There certainly is no force in the objection that we cannot examine witnesses when a defendant confesses the facts constituting the contempt.

IV. It is most strenuously urged that the Chancery Court had no jurisdiction in the first instance to issue the injunction against Anderson, and it is thence argued and of course with soundness, if the premise be granted, that there can be no punishment for violating such process. But we deny the premise. We have reached the conclusion, after painstaking investigation of the authorities, that the Attorney General as the representative of the *parens patrie* was within his power and duty in asking for an injunction restraining the defendant from illegally practicing medicine, and that Chancellor Kyle had the power and jurisdiction to grant the writ. That the criminal Courts were open to the Attorney General is no sufficient answer; nor is it adequate response that no property or pecuniary interest in complainant is shown. It is true that the general rule is that injunctions will not issue to restrain certain acts prohibited by the criminal laws, and that this process will not be awarded unless property rights are involved. But this is not without exception; and we are persuaded that the present bill can be justified under the exceptions. It was decided by our own Supreme Court in the late case of *Alexander v. Elkins*, 132 Tenn., 663, that the time had arrived for departure from the rigid rules respecting this process, and that advancing times and conditions had made necessary an extension of the power to grant this writ. An injunction restraining repeated criminal prosecutions was sustained upon the distinct ground that the defenses afforded were not sufficient guarantees.

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It is manifest that repeated indictments of Anderson and the imposition of the small statutory fine provided would afford no protection, and would still necessitate repeated suits. As a matter of fact, the culprit might continue his profession although confined in jail. Hence, the powerlessness of the criminal Courts notwithstanding the incalculable harm which might be done the great body of the people by the open and persistent and contemptuous violation of the statute and regulations which the authorities in this State have solemnly adjudged to be necessary safeguards for the health and well being of every one. If there be no precedent, it is time one is being made. The power to make precedents has not been exhausted, and when there exists a condition that needs an adequate remedy, then the Chancery Court, the protean tribunal which is supposed to respond to the social needs of the people for the purpose of affording remedies and protecting rights, should not hesitate to consider itself vested with the power to restrain and prohibit. And the Attorney General, standing as he does as the defender of the people and the protector of the morals, safety and health, should be considered as vested with the right and onerated with the duty of appealing to the equity side of the governmental powers to put down an unmixed evil and a menace which cannot be dealt with except by a restraining hand. We so hold that it may be done and believe that this exercise of power is warranted by principles as clearly established as almost any other by which rights are guaranteed. With respect to the duty of the Attorney General, see 4 Cyc., 1029; *State v. Standard Oil Company*, 120 Tenn., 86; *Attorney General v. Shrewsbury*, 1 Eng. Ruling Cases, 567. We wish particularly to call attention to some of the propositions advanced by the great English Court of Equity. It is there said that the Attorney General might apply to the

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Court to restrain the execution of any act of a public nature where it manifestly affected the public generally, and that there should issue an injunction to restrain a series of illegal acts which tended to injure the people. We also wish to call attention to the cases and accompanying notes of *State v. Crow*, 15 L. R. A. (N. S.), 747; *State v. Earlick*, 23 L. R. A. (N. S.), 691; wherein it was admitted that if conduct affected the public health an injunction might issue: *State v. C., B. & Q. Railway*, 88 Neb., 660; 34 L. R. A. (N. S.), 250; *State v. Lindsay*, 85 Kan., 79, 35 L. R. A. (N. S.), 810; *Re Debs*, 158 U. S., 564, 39 L. Ed., 1092. The opinion in the *Re Debs* case was delivered by Mr. Justice Brewer; and if we had no other authorities his reasoning would be convincing and sufficient for us. It is true that he concluded by stating that some property right must be involved, but this was an uncalled for and an unfortunate statement. It was admitted that the United States Government had no pecuniary interest and was acting simply as the sovereign charged with the duty of protecting the health, welfare and good order of the people; and the injunction was sustained solely upon the ground that it was essential to the exertion of governmental functions and powers that the repeated acts complained of, although criminal, be restrained.

All the foregoing and numerous other adjudications could be referred to as answering the proposition that an injunction is not to be denied simply because the defendant might be dealt with criminally. The trouble is to be found in the failure to discriminate between cases where the criminal Courts are themselves restrained and those where defendant who is pursuing a criminal course is enjoined. There is no basis whatever to assert in the latter case that the criminal Courts are embarrassed or that their functions are being usurped.

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V. It is not worth while to discuss the contention that the defendant is not practicing medicine. He virtually confesses it. And, indeed, no other conclusion can be arrived at. Nor need it be said that the State cannot regulate the practice of medicine and prescribe qualifications and make the practice a privilege: *O'Neal v. State*, 115 Tenn., 427. The lives of the people are too sacred to be entrusted to quacks and empirics. The art and science of medicine can be acquired only after long training, study and practice; and owing to the proneness of afflicted human kind to resort to the shrine of the faker and even to any one who holds himself out as an alleviator of pain, it behooves the authorities to exercise the very greatest care in qualifying persons to respond to this human need.

We refer to this as a privilege. It is more. It is a franchise as it were; the following of a profession, which amounts in a manner to an office, as all physicians have duties to perform which directly affect public health, welfare and morals. Hence an additional reason why the Attorney General should be vested with the power to file a bill and enjoin any one manifestly not qualified from exercising this function. Such proceedings should be assimilated to an information in the nature of a quo warranto, to the end that the right of the defendant to exercise this exalted privilege be inquired into.

Without more we adjudged the defendant guilty of contempt of this Court in violating the injunction restraining him from practicing medicine, and adjudge that he undergo confinement in the county jail of Roane County for a period of ten days and that he pay a fine of fifty dollars and the cost of this attachment proceeding, and that he be detained after the expiration of his ten days' confinement until he shall have paid or secured said fine and costs. A

IN RE PETITION OF CORNELIUS CURTIS.

mittimus is directed to be issued by the clerk of this Court to the Sheriff of Roane County commanding him to take and commit the defendant in accordance with this order.

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IN RE PETITION OF CORNELIUS CURTIS.

Affirmed by Supreme Court, 1915.

1. RESTORATION TO CITIZENSHIP. *Right thereto.*

A party who for four years after discharge from the penitentiary demeans himself properly and shows by unimpeachable witnesses that he sustains a good moral character is entitled as of right to restoration to citizenship, and he should not be denied this right simply because there is a slight suspicion that he was guilty of one offense of no great magnitude.

2. SAME. *Appeal. Right of.*

Such party has a right of appeal to this Court from the action of the circuit judge in refusing to restore him to citizenship.

3. SAME. *Motion for new trial unnecessary.*

In such case a motion for new trial is not a prerequisite to a hearing in the Appellate Court.

FROM KNOX COUNTY.

Appeal from Circuit Court of Knox County. VON HUFFAKER, Judge.

In Re Petition of Cornelius Curtis.

MALCOLM McDERMOTT for Appellant.

H. N. CATES, contra.

MR. JUSTICE MOORE delivered the opinion of the Court.

IN December, 1907, the petitioner Curtis, on a plea of guilty in both cases, was convicted in the Criminal Court of Knox County, on two indictments charging him with larceny. He was sentenced to serve two terms in the State prison, one for four years and one for a year, and on these sentences he was committed to the State prison to serve out the two terms, aggregating five years. On or about the 24th of March, 1911, he was pardoned for good behavior and faithful service, and returned to the city of Knoxville, Tennessee, where he remained until the 24th of October, 1914, when he filed his petition in the Circuit Court of Knox County, under sections 3655 to and including 3658 of Shannon's Code, asking to be restored to his rights as a citizen of the State of Tennessee. When convicted of the crime of larceny in 1907, by the Criminal Court of Knox County, he was, according to section 7199 of Shannon's Code, adjudged infamous, and disqualified to give evidence or exercise the elective franchise, and also disqualified from holding any office in this State. He sought, in the petition filed, to have these disqualifications removed by the Circuit Court of Knox County, and to be restored to his rights of citizenship.

Before the case was heard by the Court, ten days' notice of the time and place of its hearing was served upon the District Attorney of Knox County, but he failed to appear and resist the application contained in the petition. The case was first heard the 28th of November, 1914, before the Circuit Court of Knox County, present and presiding the Honorable Von A. Huffaker, the Circuit Judge ap-

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pointed to hold that Court. The petitioner offered four unimpeachable witnesses to prove that, since he had been pardoned out of the penitentiary, he had sustained the character of a person of honesty, respectability and veracity, and that he is generally esteemed as such by his neighbors. These witnesses had each known him since his release from the penitentiary, and some of them before his conviction and sentence to prison. He had worked for each of them at different times since he was pardoned. These four witnesses, each of whom is regarded as among the best white citizens of Knox County, stated in substance that the petitioner was generally regarded as an upright, honest and faithful man, that he had worked for each of them, that he had been a trusted, faithful servant and that they believed in his honesty and integrity and had trusted him in their houses and were willing to trust him again. They stated that his general reputation was good and that he had conducted himself, ever since his release from the penitentiary, as an honest and faithful colored man, and that they had never known him, or heard of his having committed any wrong in any way since he was pardoned out of the penitentiary. Two of these witnesses were prominent lawyers of Knox County, while one of them had been deputy sheriff and secretary of the Knoxville Board of Commerce. The fourth one was a court reporter and knew petitioner well.

The petitioner is a colored man and has a wife living in Knoxville, where they had been living for some time before his conviction and sentence to the penitentiary in 1907. The Attorney General not being present at the hearing, the Circuit Judge, after these four witnesses had testified, called on petitioner himself to take the stand and make a statement. The record shows that petitioner was "duly sworn, and testified as follows." He was examined

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by the Court, and told all about his former offenses for which he was indicted and convicted, and his pardon because of his good behavior. He stated that he had never been in any trouble since he was sent to the penitentiary and had never been guilty of any crime of any character from that time, except that he was accused of stealing house keys from Mr. Turner.

On this record we do not think that there is any ground to suspect that petitioner had anything to do with taking Mr. Turner's keys, as is intimated in this record. That they were missing for a period of twelve or fifteen hours is true, but there is more reason to believe, or to suspect, the cook took the keys and placed them there where they were found, than to suspect that petitioner had anything to do with them. This record satisfies us that the petitioner had nothing to do with the loss of those keys, and the Circuit Court should have so found, and on the testimony offered by petitioner, that Court should have granted him the relief sought in his petition; but the Court refused him the relief and gave judgment dismissing his petition at his cost.

It is insisted by counsel representing the Attorney General for the State, that there was no motion for new trial in the lower Court, and, consequently, petitioner has no standing in this Court. We do not think the rule requiring a motion for new trial where the case is heard by the judge without a jury, applies in a case like this. Even if it did, and we do not think it does, it appears the case was first heard on the 28th of November, 1914, when the petition was dismissed, the relief sought thereby refused, but on the 2d of January, 1915, a rehearing was granted on motion of the petitioner, when the whole case was again gone into and the petition again dismissed at the cost of

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petitioner. If a motion for new trial was necessary, we think a petition to rehear the case was in effect the same thing. But, we do not think, in a case like this, that a motion for new trial was necessary. This is an *ex parte* statutory proceeding, where the State is supposed to be represented by the District Attorney; but in this case he did not feel inclined to resist petitioner's application and was not present.

It is next insisted that no appeal lies from the judgment of the Circuit Court in a proceeding like this. We are unable to see any reason why an appeal does not lie from a judgment of the Circuit Court in a case like this, as well as from any other judgment that Court renders. It is the Circuit Court that is given jurisdiction of such petitions, and it is the Circuit Court of the county where the petitioner resides, that hears and determines whether the relief prayed for shall be granted. It is the Circuit Court that must be satisfied by the proof that the petitioner offers before the relief asked is granted. Under section 6066 of Shannon's Code, the Circuit Court is given exclusive jurisdiction to hear and determine applications to be restored to citizenship made by persons who have been rendered infamous by the judgment of any Court of this State. If the statute required the application to be made to the Circuit Judge instead of the Circuit Court, then it might be argued that he was constituted by the statute a special tribunal for hearing and determining such applications, and from his findings no appeal would lie; but the statute gives the Circuit Court jurisdiction of such matters, and, in fact, gives it exclusive jurisdiction, and that Court is authorized to render a judgment granting the relief sought in the petition, or to render a judgment dismissing the petition and giving a judgment against the petitioner for the cost of the proceedings.

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Section 4891 of Shannon's Code provides that any one or more of the parties to a judgment or decree, may pray and obtain an appeal therefrom, and there is made in this section no exceptions, but it would seem that any and all parties, in any character of case, where a judgment is rendered, may pray and obtain an appeal therefrom, and we think in this case that, where the petitioner is denied the relief asked for in his petition, and it is dismissed, he may pray and obtain an appeal from such judgment to this Court and have his case tried *de novo*, on the proof heard in the lower Court, and that this Court may grant him such relief, or refuse such relief, as the evidence in the record justifies.

The prayer for an appeal was granted by the Circuit Judge upon the petitioner making and filing the pauper oath, and it is insisted that his appeal should be dismissed because he has no right to appeal the case on the pauper oath, inasmuch as he has been deprived by the judgment of the Court of his citizenship. It is furthermore insisted that he has not even the right, being rendered infamous, to take and subscribe to the pauper oath. We are unable to agree to either contention. It is true section 3658 of Shannon's Code requires that the petitioner shall pay the cost of his application, but that does not deny him the right to appeal, or even to institute the proceedings, on the pauper oath. That provision was intended to exempt the State from liability for the cost of the proceedings, and to make the petitioner, in all cases, liable therefor. By taking the pauper oath in lieu of an appeal bond, or a prosecution bond, he is not exempt from a judgment against him for the costs of the cause; and the Circuit Court in this case, rendered a judgment against the petitioner for the costs of the cause, although he had made and filed the pauper oath in lieu of a prosecution bond.

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It is said that, not having his rights as a citizen restored to him, he is not such a citizen as can prosecute a suit or an appeal, on the pauper oath, and that inasmuch as this privilege is confined to citizens only, those not citizens cannot avail themselves of this privilege. The Act of 1901, chapter 126, cited by learned counsel for the State Attorney General, applies not only to citizens, but to residents of the State, and has been so held in 1 Cates, 343. Granting that petitioner is not a citizen of the State because of the judgment of infamy rendered by the Circuit Court upon his conviction of the crime of larceny, yet there can be no gainsaying the fact that he is a resident of the State, and, under the provision of the above cited Act, he is entitled to prosecute a suit, or an appeal to a higher Court, on the pauper oath. We have in this State, many persons who are residents of it but who are not citizens, and it was for their benefit that the word resident was incorporated into the Act of 1901. We think it probable that, under that Act, aliens, if residents of this State, might institute a suit, or prosecute an appeal, by taking and filing the pauper oath in lieu of an appeal bond, though that question we do not decide; and yet we are clearly of the opinion that a resident of this State, not merely a temporary resident but one who permanently resides here, as does this petitioner, can avail himself of the benefit of the Act of 1901. We are clearly of the opinion that the petitioner in this case, being a permanent resident of the State, is entitled to the benefits of this provision of the statute. Being incompetent to testify as a witness in a case, learned counsel insists that he would be incompetent to take and subscribe to the pauper oath in lieu of an appeal bond. The learned trial judge seems not to have taken that view, for he called the peti-

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tioner as a witness and had him sworn, and permitted him to appeal to this Court on the pauper oath.

It was held in 2 Pick., 472, that a defendant in a criminal case, who had been rendered infamous when convicted on a former trial, was competent to testify in his own behalf in such case, under the Act of 1887. If competent to testify in his own behalf, it seems to us clear he would be competent to make an affidavit in his own behalf in order to obtain an appeal from a judgment against him where it clearly appears that he is a resident of the State.

The motion to dismiss this appeal is, for the reasons stated above, overruled; and, believing that this petitioner has shown himself entitled by the testimony of four unimpeachable witnesses, that he is entitled to be restored to his rights as a citizen, the judgment of the lower Court is reversed and he is granted the relief prayed for in his petition, and a judgment will be rendered against him for the costs of all these proceedings, which he is hereby ordered to pay and satisfy.

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N., C. & ST. L. RAILWAY v. ALICE NORTH.

Affirmed by Supreme Court, 1915.

1. FINDING OF FACT OF CIRCUIT JUDGE WITHOUT REQUEST.

No peculiar weight will be given to the findings of fact of the circuit judge filed without request.

2. CARRIER OF PASSENGERS. *Baggage. Baggage taken into day coach.*

The usual rule is that a carrier is not liable for the loss of baggage taken upon a day coach by a passenger and retained by him. But if the servants of the carrier in any way assume custody of the baggage, there will be liability in case of unexplained loss.

FROM DAVIDSON COUNTY.

Appeal in error from the Circuit Court of Davidson County. THOS. E. MATTHEWS, Judge.

CLADE WALLER and CORNELIUS HALL for Plaintiff in Error.

W. R. CHAMBERS and GEO. THOMAS for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS action was brought by Miss Alice North, defendant in error, against the Railway Company before a Justice of the Peace of Davidson County, to recover the value

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of a suit case and its contents alleged to have been lost through the negligence of the defendant company.

The case finally reached the Circuit Court of the county, where it was tried before the Circuit Judge without the intervention of a jury, and judgment was rendered in favor of the plaintiff below. The Railway Company's motion for a new trial having been overruled, it has appealed to this Court, and has assigned errors.

The only material error assigned is that there is no evidence to support the judgment.

There appears in the record a written finding of facts prepared and filed by the Circuit Judge, but the record fails to disclose that this written finding of facts was made and filed upon the request of either of the parties to the suit, and will, therefore, be treated as immaterial in determining the question raised by the assignment of error; that is, whether or not there is any evidence to support the judgment.

Evidence was offered by the plaintiff below tending to show that on August 22, 1914, she, with a party of friends, boarded one of the plaintiff in error's passenger trains at the Union Station in Nashville, Tennessee, for the purpose of going to Bellevue, Tennessee, a station on the plaintiff in error's line of road, about twelve miles from Nashville, she and her friends having purchased from the plaintiff in error's agent at Nashville separate tickets entitling them to transportation over its road between the two points above mentioned.

The members of defendant in error's party, eight in number, besides the defendant in error herself, were going to Bellevue, or to a point near Bellevue, on a camping or fishing trip. All members of the party had hand baggage, consisting of suit cases and valises. The party con-

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sisted of four young ladies and four young men, and a Mrs. Joy, who acted as chaperone for the party.

When they assembled at the Union Station in Nashville, they deposited their suit cases in a group in the general waiting room, and the same were watched by Mrs. Joy (the chaperone) while other members of the party purchased tickets, including one for Mrs. Joy. The suit case of the defendant in error was among the baggage deposited in the manner stated. When the party repaired from the waiting room to the train, the evidence tends to show that the young men, members of the party, together with some young men who were not members of the party, carried the baggage to the train. Evidence was offered tending to show that defendant in error's suit case was carried and placed upon the train by Mr. Tarkington, who did not accompany the party to Bellevue. All of the baggage belonging to the members of said party, owing to the crowded condition of the coach into which they were directed by the trainmen, was deposited in the aisle of the coach beside the seats near where the party was standing, some of the suit cases resting on top of each other.

Owing to the crowded condition of the coach, only two members of the party were able to secure seats, these being Mrs. Joy and her daughter. The other members of the party had to stand in the aisle, and the proof shows that there were other passengers also who had to stand on account of being unable to secure seats.

After the train had proceeded from Nashville some distance, a trainman in uniform (being either the conductor or the flagman, the evidence does not definitely establish which), came through the coach and moved practically all of the baggage, including the suit case of defendant in error, from the aisle, and placed it in different portions

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of the coach, some of it on the racks above the seats, and some of it between the seats, which had their backs turned to each other, and in a different portion of the coach from which the defendant in error and her party was standing. Defendant in error and other members of the party saw the trainman so placing the baggage, but did not notice where he placed any particular piece of baggage, supposing that they would have no difficulty in finding it when the train reached Bellevue, or that the trainman, if necessary, would show them where the same was located.

Upon the train reaching Bellevue and the station being called, defendant in error endeavored to find her suit case, but could not do so. She, thereupon, notified both the conductor and the flagman of said train that she could not find her suit case, but they did not offer to aid her in searching for said suit case. After looking through the coach hurriedly and excitedly for her suit case, and failing to find it, she went out on the platform of the coach, and called to some of the members of her party, who were standing on the depot platform, to know if they had her suit case. And upon being told that they did not have it, defendant in error started back into the coach to make additional search, but upon reaching the door of the car, she was met by a trainman (either the conductor or the flagman), who told her that she would have to get off, and with his hand on her shoulder called to some of the members of the party standing on the depot platform near the steps of the coach to catch her. Defendant in error then alighted from the train without her suit case. She then immediately, or some of her friends for her, telegraphed to the next station on defendant's line, requesting that further search be made for her suit case, giving a description thereof.

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Both the conductor and the flagman admit that they were informed by defendant in error before the train left Bellevue that she had lost her suit case. They both deny, however, that they removed or handled the baggage of the party, after it was placed upon the car, for any purpose. They both deny that they removed any of said baggage from the aisle, though they admit that they had instructions from their superiors to keep the aisles of the cars clear of baggage and other obstructions. They both testified that the first and only search made by them for the defendant in error's suit case after leaving Bellevue was made at Kingston, a station about twelve miles west of Bellevue, but failed to find it; that while other suit cases were found in the coach, other passengers claimed them, and they were unable to identify any of them as defendant in error's suit case. They admitted that there are two stations between Bellevue and Kingston, where passengers get on and off, and that some passengers got off at these places upon the occasion in question. It is admitted that the suit case was never found, and was entirely lost to the defendant in error. The undisputed evidence shows that the value of the suit case and its contents was \$86.00.

It is insisted by the plaintiff in error that there is no evidence in the record tending to show that the defendant in error's suit case was ever put upon the train. This contention cannot be sustained.

While it is true defendant in error could not say positively that she saw her suit case carried into the coach, it is shown by the testimony of Mr. Tarkington that he did carry a large suit case answering the description of defendant in error's suit case into the car. It is shown by the testimony of Miss Billie Settle, whom Mr. Tarkington escorted from the waiting room to the train, that Mr. Tark-

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ington carried to the train two suit cases—one belonging to her (Miss Settle), and the other belonging to the defendant in error. She testified that she knew defendant in error's suit case well, having traveled with it on previous occasions, and is positive that she saw the same after it had been deposited in the aisle of the car by Mr. Tarkington.

Mrs. Joy (chaperone of the party), also familiar with the suit case, is positive that she saw it setting in the aisle of the coach before the baggage was moved by the trainman.

It is next insisted that the Railway Company cannot be held liable for the loss of said suit case and contents, because it was in the exclusive custody and control of the defendant in error, and the Railway Company was not an insurer of the safety of the same.

It was held in *Railroad Company v. Lillie*, 112 Tenn., 331, that where a passenger retains exclusive custody and control of his baggage, the Railway Company is not liable for its loss.

But we do not think this rule applies in a case where the employees of the Railway Company take the passenger's baggage out of his custody and control, and assume control of it themselves by depositing it in another portion of the car. We think this act itself would render the Railway Company an insurer for its safety. We think this rule is fully recognized in the case of *Railroad v. Lillie*, *supra*.

There is an abundance of evidence in the record tending to show that one of the officers of the train (either the flagman or the conductor), took charge of the defendant in error's suit case, and removed it to another portion of the car remote from where she and her friends were standing, and in doing so, we think the Railway Company be-

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came responsible for its safety during the remainder of the trip: *Railroad v. Katzenberger*, 16 Lea, 380; *Railroad v. Lillie*, *supra*.

The judgment is affirmed with costs.

GEORGE F. WHITTAKER V. MONTEREY SPOKE COMPANY.

Writ of certiorari denied by Supreme Court, 1915.

1. AMENDMENTS. *Practice. Substituting real name of defendant.*

A plaintiff who sued and had process served upon a trading firm or corporation may, upon discovery that the concern was owned and operated by an individual, amend his process and pleadings by inserting the name of the real owner.

2. STATUTE OF LIMITATIONS. *Amendment. Relation back.*

In such case the defendant who responded to the summons served upon him under his trade name will not be permitted after the declaration has been amended so as to make him the defendant to interpose the plea of the statute of limitations of one year, notwithstanding plaintiff was injured more than one year prior to the amendment.

3. DEMURRER. *Based upon statute of limitations.*

Where a declaration shows upon its face that the right of action of plaintiff is barred, the defendant may interpose a demurrer.

FROM PUTNAM COUNTY.

Appeal in error from the Circuit Court of Putnam County. C. E. SNODGRASS, Judge.

Whittaker v. Spoke Co.

WORTH BRYANT, O. K. HOLLADAY and W. F. CLOUSE
for Plaintiff in Error.

ALGOOD & FINLEY for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the
Court.

THIS suit was instituted by plaintiff in error against the Monterey Spoke Company as a corporation organized and chartered under the law of the State of Ohio, to recover damages for personal injuries received by him while in its employ. Process was served upon E. S. Jones as the representative of the Monterey Spoke Company.

The original declaration filed in the case containing two counts declared against the Monterey Spoke Company as a corporation organized under the law of the State of Ohio.

For the purpose of disposing of the case as it is before us, it must be conceded that the declaration filed in the case stated a cause of action against the Monterey Spoke Company.

The original declaration in the case was filed November 25, 1914. The Monterey Spoke Company, November 28, 1914, put in a plea of the general issue, that is, that it was not guilty of the matters and things alleged in the declaration.

It appears that at the March term of the Circuit Court, 1915, the case was called for trial and a jury was impaneled, and plaintiff in error read his declaration to the Court and jury, in both counts of which the Monterey Spoke Company was sued as a corporation organized and chartered under the law of the State of Ohio, and the Monterey Spoke Company read its plea of "not guilty" and the witnesses for both parties were sworn and put under the rule.

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Before introducing any evidence, plaintiff in error, by his attorney, stated to the Court that he had recently ascertained that defendant in error was not a corporation, as alleged in the declaration and set out in the summons in the case, but that E. S. Jones was the sole owner of the defendant company and it was controlled by him, and that the Monterey Spoke Company was a trade name adopted and used by him in conducting a spoke and rim business at Monterey, and he thereupon moved the Court to be permitted to strike out of the summons in the case and the declaration the allegation so as to make E. S. Jones a party defendant, and to make said amendment in the declaration by writing same on the face thereof and on the minutes of the Court and by interlining in both counts of the declaration so that each of the counts, instead of reading: "The plaintiff, George F. Whittaker, sues the defendant, the Monterey Spoke Company, a corporation organized and chartered under the laws of the State of Ohio," to read in each count: "The plaintiff, George F. Whittaker, sues the defendant, the Monterey Spoke Company, which is owned and controlled by W. S. Jones and adopted and used by him as a trade name in the conducting of a spoke and rim business at Monterey, and to amend likewise the motions in the case commanding the sheriff to summon the Monterey Spoke Company, "which is owned and controlled by said Jones and adopted and used by him as a trade name in operating its business in Monterey."

The Court allowed these amendments, to which action of the Court, the defendant, E. S. Jones, excepted at the time. When this amendment was made, over objection, E. S. Jones, March 25, 1915, demurred to the amended declaration upon the ground that it showed upon its face that the injury occurred more than twelve months prior

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to the time when Jones was made a party to the suit and action brought against him, and that, therefore, it was barred by the statute of limitations of twelve months.

The Court sustained this demurrer and to this action of the Court the plaintiff below excepted and presented to the Court his affidavit alleging, that he had only recently learned that the defendant was not a corporation, and that said Jones had fraudulently concealed the fact that he was the owner of said company and that it was not a corporation. His affidavit contains various other averments, to the effect that Jones had held the Monterey Spoke Company out to the world as a corporation. Based upon this affidavit, he moved the Court to be permitted to plead to said demurrer the said fraudulent conduct on the part of Jones as a condition and reason why the demurrer should not be sustained, and he presented a plea to this effect to the Court and asked leave to file it. This plea to the demurrer the Court held not to be good and refused permission to plaintiff below to file the same, and to this action of the Court plaintiff below excepted.

Plaintiff below moved the Court to vacate and set aside the judgment before entered sustaining the demurrer, and this motion was overruled.

From these orders and actions of the Court plaintiff below excepted and prayed an appeal to this Court. We should have stated that the plaintiff below, before appealing, moved the Court for a new trial, stating nine grounds in support of his motion, which was overruled. He then moved in arrest of judgment, stating five grounds in support of his motion, which was overruled and he thereupon appealed to this Court.

Now, it is conceded in this case that plaintiff below received his injuries while in the service of the Monterey

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Spoke Company on or about February 17, 1914. This, of course, was more than twelve months before the declaration and the summons were amended as hereinbefore indicated.

Plaintiff in error assigns four errors in this case. Resolved to their legal basis, they all resolve themselves into the proposition that the Court erred in sustaining the demurrer to the declaration as amended.

The first assignment of error, in the shape and form in which it is presented, is not well taken. Its essential idea is, that the Court erred in sustaining the demurrer because it did not affirmatively show that the cause of action was barred by the statute of limitations of twelve months. In support of this assignment, it is stated that the plea of the statute of limitations is a special plea personal in its nature and which may be waived or asserted, and that the parties relying upon it must affirmatively set it up in his pleadings.

It is not sufficient, proceeds the argument, where the demurrer relies only and alone upon the want of facts alleged.

We think that where the record shows that the accident occurred more than twelve months before the suit was brought in a damage suit of this kind, the statute of limitations may be presented under a demurrer, which, in effect, in such a case, is the same as a plea.

We think the second assignment of error is well taken. In other words, as we view this case, the amendment did not change the cause of action against the defendant against which it was brought. The action was brought against the Monterey Spoke Company. The mere fact that the declaration and summons designated it as a corporation did not divest it of its character and nature as the Monterey Spoke Company.

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Process was served upon E. S. Jones, as the manager, or controlling officer, of the Monterey Spoke Company, and he put in the plea of "not guilty" for the Monterey Spoke Company, sued as a corporation organized under the laws of Ohio. The real party responsible for the injury to the plaintiff, if any one was answerable in damages, was before the Court under the original summons and under the original declaration. The mere amendment of the declaration did not change the character or nature of the suit, and the amendment did not bring before the Court a new party, or constitute a new cause of action. The whole situation might have been remedied by plaintiff in error simply striking out the words in the original summons and in the original declaration: "A corporation organized and chartered under the laws of the State of Ohio."

Our Courts are very liberal in allowing amendments and in holding that they relate back to the institution of the suit, where the cause of action and the real party sued have not been changed. E. S. Jones, the real party defendant in this case, doing business under the name of the Monterey Spoke Company, was served with process under the original summons, and he answered by putting in the plea of "not guilty," thereby recognizing in said plea, that, so far as he was concerned, the Monterey Spoke Company was a corporation organized under the laws of the State of Ohio.

It appears from the amendment to the declaration that the Monterey Spoke Company was simply a trade name adopted by Jones, and service upon him was sufficient and did, as we think, bring him before the Court. So the amendment did not change the parties, but merely put the record in a position to speak a technical truth.

Whittaker v. Spoke Co.

It has been frequently held that an amendment charging defendant as a partnership, instead of as a corporation, when it is a corporation, may be amended without changing the nature of the suit.

The general rule announced by the authorities is, that where a defendant has been actually served with a summons, although in a wrong name, if he plead, he cannot afterwards complain. *Robertson v. Winchester*, 85 Tenn., 171.

As a matter of fact, the words, "a corporation organized and chartered under the laws of the State of Ohio," were mere descriptive terms, and, striking these words out, did not introduce a new party to the suit, and did not change the cause of action stated in the declaration.

In 31 Cyc., page 490, the general proposition is announced, that where a defendant is styled a corporation, the plaintiff may amend by averring that the defendant is an incorporated association, and by bringing suit against an individual named as president or the persons constituting the association. *Munziger v. Courier Co.*, 82 Hun. (N. Y.), 575.

In analogy to the principle announced, we refer to the following Tennessee cases: *N., C. & St. L. Ry. Co. v. Foster*, 78 Tenn., 351; *Ry. Co. v. Mahoney*, 89 Tenn., 311.

The result is that the judgment of the Court below sustaining the demurrer is reversed and the cause is remanded to the Circuit Court of Putnam County for further proceedings in accordance with the opinion of this Court.

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PRESTON TAYLOR V. FRED BEARDEN.

Affirmed by Supreme Court, 1915.

1. MENTAL ANGUISH. *Recovery for. Breach of contract.*

The general rule is that there can be no recovery for mental anguish sustained as the result of a breach of contract. An exception is where the parties contract with reference to feelings and sentiments, and know that peculiar mental suffering will result from a breach.

2. UNDERTAKER AND EMBALMER. *Liability for negligence or unskillfulness.*

An undertaker and embalmer may be held liable in damages for the negligent or unskillful embalming or handling of a corpse where he has contracted to perform these services in a careful and skillful manner.

3. DAMAGES. *For Mental anguish not punitive, but compensatory.*

Damages allowed for mental anguish where such damages are recoverable are compensatory and not punitive.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County. THOS. E. MATTHEWS, Judge.

W. D. COVINGTON and HARRY LUCK for Plaintiff in Error.

CHARLES GILBERT and LEVINE & LEVINE for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

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THIS is a singular lawsuit, but its novelty is not sufficient to repel the one who brought it. It was an action by Bearden, as the husband of his deceased wife, to recover damages of Taylor growing out of the negligence of the latter in undertaking to embalm and prepare for burial the body of his wife. The gravamen of the action was the annoyance, mortification, discomfort and disappointment suffered by the husband because of the negligent and unskillful way in which the embalmer undertook to embalm the remains.

Bearden obtained a verdict for \$400. The Circuit Court Judge refused to set it aside and pronounced judgment. From this judgment Taylor has appealed and assigned errors. The first assignment is that the Court erred in not directing a verdict. But it is sufficient for this error to state that it was not embraced in the motion for a new trial. The second assignment of error, of like purport, will also have to be overruled. The third assignment is to the effect that there is no material evidence to support the verdict and that for this reason the judge should have set it aside and granted a new trial. We sufficiently indicated the nature of the cause at the beginning of our opinion. It suffices to say that the language of the declaration was of that purport, and, further, that there was material testimony tending to support the averments. The essential points of dispute were as to whether the embalmer engaged by Taylor to do this work was negligent, inefficient or unskillful, and whether because of this negligence or unskillfulness the body was not put into a proper state of preservation; and whether because of this plaintiff below suffered mortification, disappointment, chagrin, and other forms of mental anguish. While the question of unskillness of the embalmer is somewhat prob-

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lematical, and while the question as to whether the very best of embalmers could have preserved this body and prevented decomposition after the lapse of a short while is very uncertain, still we find in the record substantial testimony to the effect that the embalmer did not pursue the proper course and did not observe those precautions which would have occurred to a reasonably skillful embalmer, in consequence of which the body exhibited decomposition at a very early stage and reached that condition which necessitated its complete enclosure, thus depriving the plaintiff below of his right and privilege of looking upon the features of his dead wife just prior to her interment. It is urged, and with great force, that embalming is a matter of experiment and of guess, and that no one can insure the success of any undertaking by an embalmer, and it is earnestly insisted that even the most skillful embalmers often fail to arrest the process of decay. These arguments have struck us with great force, but we feel bound to give effect to the finding of the jury that in this case proper skill was not exhibited nor suitable precautions given, and that in consequence the plaintiff below suffered very great mortification and mental anguish.

It is also contended by able counsel that this is an action for breach of contract and that recoveries for mental anguish in such cases are unknown to and unauthorized by the law; and it is insisted that the damages awarded Bearden were for these only. The general rule is that there can be no recovery of damages for mental anguish occasioned by breach of contract, but to this rule there are some exceptions. One well-known exception is of that class of actions which sound more in tort than for breach of contract. Another exception, or rather one branch of the exceptional cases just referred to, is where the parties

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enter into a contract with personal feelings, sentiments and wishes in contemplation, especially where it is understood at the time of contracting that there will be keen mental anguish and suffering consequent upon a breach. In all such cases there may be a substantial recovery for mental anguish alone. See 8 Rul. Cas. Law, sections 83 and 84. See, also, in particular the cases of *Renihan v. Wright*, 125 Indiana, 536, 9 L. R. A., 514; and *L. & N. Railroad Co. v. Hull*, 57 L. R. A., 771. Both of these cases deal with rights of action for wrongful handling of corpses, and the right of action of the immediate family to substantial damages as solace for mental anguish is recognized and clearly demonstrated. See, also, the subject of Dead Bodies in 8 Rul. Case Law.

We are persuaded that when an embalmer engages to embalm a dead body and to prepare it for retention for more than the usual length of time after death, he contracts with the family that he will accomplish the desired end if it can be done with reasonable care and skill, and that if he fails because of this lack he will indemnify the disappointed one for his breach.

It is contended that this is an allowance of punitive damages, and that there can be no recovery of this species of damages in actions for breach of contract. But the recovery awarded in this case cannot be classed as exemplary damages. They are, instead, treated as awards of compensatory damages. 8 Rul. Case Law, section 72.

We recur to the fourth assignment of error, in which the amount of this verdict of \$400 is assailed. We think this should be sustained. We observe that the conduct of the embalmer engaged by Taylor was not characterized by wilfulness or wantonness and that the complaint of Bearden is for negligence and lack of skill only. In some

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jurisdictions plaintiff would be repelled altogether because of the absence of willful or wanton conduct; and this should be the rule in general in dealing with actions for breach of contract. But we observed at the outset that this is a peculiar case, and it should be treated as *sui generis*. It was well understood by the embalmer that disappointment and mortification would result from his failure to preserve the body, and hence the logic of allowing some substantial damages. But the jury gave too much in this case, so much as to shock the judicial conscience. We know that members of the colored race lay great store upon funerals, and that the failure to have them pass off in regulation style and with pomp and ceremony is a keen disappointment, but we note that in this case there was no marring of the program, and that the interment proceeded in the customary way. Plaintiff below must therefore depend upon those things occurring at his house as the basis of his claim for damages. We know that \$400 would solace him fourfold. It is therefore apparent to us that the allowance of this amount of damages was unreasonable and capricious. It is therefore directed by us that defendant in error enter a remittitur of \$250.00. If so, judgment for the remainder, \$150.00 with costs will be affirmed. In case of non-acceptance the case will be remanded for a new trial at the cost of defendant in error.

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E. L. McLAIN V. STATE OF TENNESSEE.

1. **TAXATION OF COSTS BEFORE A JUSTICE. *Frivolous prosecution. Removal to Circuit Court.***

A prosecutor in a criminal case before a Justice of the Peace who has been taxed with the costs upon the ground that the prosecution was frivolous may take the case to the Circuit Court by *certiorari* and there have a trial upon the question.

2. **SAME. *How question determined.***

In such case it becomes the duty of the circuit judge to hear all the evidence offered and then determine whether the prosecution was malicious and frivolous; and he is not restricted to the evidence written down by the justice; nor is the prosecutor denied this right where the justice has failed to transcribe the testimony as directed by statute.

3. **SAME.**

If in such case it appear that the prosecution was not frivolous, the prosecutor must be relieved of the judgment for costs.

FROM BEDFORD COUNTY.

Appeal in error from Circuit Court of Bedford County.
JNO. E. RICHARDSON, Judge.

W. H. CROWELL for Plaintiff in Error.

ATTORNEY GENERAL for the State.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS is a proceeding brought into the Circuit Court of Bedford County, to have the costs retaxed in two criminal prosecutions, which had been instituted by the plaintiff,

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McLain, as prosecutor, before two Justices of the Peace of said county.

It appears that, on the 8th of October, 1913, McLain, who is a colored man living in Bedford County, went before a Justice of the Peace and made affidavit that certain other colored persons had been guilty of disturbing public worship, and sought to have them arrested and brought before the Justice to be dealt with as the law directed. The warrant was issued and the parties charged were arrested and brought before the Justice who, after hearing the evidence in the case, discharged the defendants and taxed the prosecutor, McLain, with the costs, on the ground that such prosecutions were frivolous or malicious.

After the Justice discharged the defendants, the prosecutor, feeling that he had not gotten a square deal in the trial, on the 17th of October, 1913, went before another Justice of the Peace and made another affidavit to the effect that the same parties had been guilty of disturbing public worship, when the latter Justice issued a warrant for the arrest of these parties. The defendants were arrested and brought before this Justice on the 27th of October, 1913, when, after hearing the evidence offered by McLain, the Justice rendered a judgment that defendants were not probably guilty, and dismissed the case, and in his judgment recites, "Prosecutor to pay costs."

In one judgment in one of the cases against Rich Jarrett, the Justice dismissed the case as to him, "For want of probable cause. Prosecutor to pay all costs," and in another case against John Jordan, he was discharged because the evidence was not sufficient to show probable cause, "And prosecutor taxed with the costs."

In each of the first prosecutions begun on the 8th of October, and heard on the 13th of October, the Justice

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taxed the plaintiff, McLain, with the costs, "Been frivolous or malicious prosecutions."

The cases were first heard before Justice Turner on the 13th of October, 1913, and afterwards the cases against the same defendants, upon the same charge, were heard by Justice Gant, on the 29th of October, 1913. In the judgments of Justice Turner, he recites that the prosecutions were frivolous or malicious, without saying which; but in the judgments of Justice Gant, in each case, he taxed the prosecutor with the costs without saying why, or whether he thought the prosecutions were frivolous or malicious, or both.

On the 29th of November, 1913, after these judgments for costs were rendered against the prosecutor, McLain, he presented a petition to Judge Richardson of that Circuit, setting out all of the facts and asking the removal of these cases into the Circuit Court by writs of *certiorari*, to have the judgment of the Justices taxing him with costs of these prosecutions, reviewed by the Circuit Judge and the costs retaxed against the State of Tennessee. The Circuit Judge directed the Clerk of the Circuit Court at Shelbyville, to issue the writs of *certiorari* as prayed for in the petition, conditioned upon the petitioner executing a bond to pay the judgment against him for costs and such costs and damages as they accrued in the case in the Circuit Court, said bond to be in the sum of \$100.00. This bond was executed, the writs of *certiorari* issued and the case removed to the Circuit Court of Bedford County. There does not appear to have been any motion made in that Court to dismiss the petition, but on the 17th of April, 1914, the cases came on to be heard before Judge Richardson, and after a statement was made by counsel for both plaintiff and defendant, and we presume the State

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was represented by its District Attorney for that Circuit, the learned trial judge stated that, unless the evidence that was heard by the Justices at the committing trial before them, was reduced to writing by the Justice before whom such trial was had, it was not competent for the petitioner, McLain, to offer any parol testimony as to what the evidence was that was heard by the Justices when the defendants were discharged and he was taxed with the costs. In other words, the learned Circuit Judge decided that no evidence was competent before him of the testimony heard by the Justices, unless such evidence was reduced to writing by the Justice at the time of the committing trial in accordance with section 7021 of Shannon's Code.

McLain, after the cases were taken up for trial, offered himself as a witness to tell the trial judge what testimony he offered before the Justices of the Peace to show that the defendants, in the committing trials, were guilty of disturbing public worship, and that there was probable cause to believe them to be guilty. He went into the testimony heard by the Justices at length, detailing his own evidence, as he gave it at the committing trials, and detailed what other witnesses testified in such trials before the Justices; and at the conclusion of his evidence the learned trial judge excluded his testimony as incompetent, and held that no one could testify as to what the evidence was before the committing trials, except the Justices of the Peace themselves. Inasmuch as it appeared that the testimony at the committing trials was not reduced to writing, as required in the section of the Code cited *supra*, the learned trial judge held that McLain could offer no parol testimony or evidence, except that it was competent for the Justices who heard the cases to testify as to what evidence was introduced before them on behalf of the State

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by the prosecutor McLain, to show that the defendants in such cases were probably guilty of the offense of disturbing public worship.

After such ruling, Justice Turner, by whom the first committing trial was heard, was then examined as a witness as to what testimony was heard by him in such committing trial. After he was examined, another Justice who seems to have sat with Justice Gant, before whom the last committing trial was heard, was examined by the Circuit Judge, and he in part detailed the evidence that the prosecutor, McLain, introduced in behalf of the State at the second committing trial. At the conclusion of this evidence, the Court stated that he "Is of the opinion and so adjudget, that no evidence except it be written by the Justice of the Peace, is competent and that the plaintiff's petition be dismissed, and the State recover of petitioner, McLain, and the surety on his cost bond, all of the costs of the cases." The bill of exceptions states that the Court disallowed McLain's parol testimony which he had given before the Court, and the parol testimony of his witnesses upon the ground that the Justice had not reduced such testimony to writing at the committing trial when the criminal prosecutions were heard by them. In the bill of exceptions, it is said the Court held first, "No statement of the testimony below except that of the Court (J. P.) trying the case can be heard. Second, the evidence below must have been reduced to writing to make it available here."

We understand from the ruling of the trial judge, that he held the testimony of the Justices as to what evidence they heard at the committing trial, to be competent in the case before him, but that inasmuch as the evidence heard by them was not reduced to writing by them, it was not

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competent for any other witness to testify as to what evidence the prosecutor offered before the Justices on the committing trials; and it is insisted by learned counsel in this Court, as no doubt it was in the lower Court, that the ruling of the trial judge in these respects, was manifestly error. It is next insisted that, even if the Court was not in error in refusing to allow plaintiff to offer parol evidence of the testimony heard at the committing trial, except to hear what the Justices themselves said about it, the testimony of these Justices show that there had been a violation of the criminal law by the defendants in disturbing public worship, and that there was probable cause to believe these defendants guilty thereof, and for that reason it was manifestly erroneous for the trial Justices to tax him with the costs of these criminal proceedings on the ground that they were malicious or frivolous. It being error for the Justices to so tax him with the costs, the Circuit Judge should have so found and taxed this cost against the State of Tennessee.

The question raised by the assignments of error, is new in Tennessee; that is, we have no case directly in point. There is no case in Tennessee that holds that proof of the testimony heard before a Justice in a committing trial, can only be made by the written evidence of such testimony when taken down in writing during the trial. That is, no case has yet gone the length in this State, as to hold that it is not competent to prove by parol testimony in the Circuit Court, where the case has been removed by *certiorari*, what the evidence was at the committing trial.

In *Frazer v. State*, 2 Swan., 535, it appears the question was not raised, and the only question in that case was whether the action of the Circuit Judge in taxing the prosecutor with the costs of an indictment which had been ignored by the grand jury, because the prosecution was frivo-

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lous or malicious, without hearing the proof, was error or not. It appears the prosecutor had gone before the grand jury to give evidence on an indictment against one Jones, and that the grand jury returned the indictment not a true bill, after which the Attorney General moved to tax the prosecutor with the costs, without any proof to support the motion, and the Court, without such proof, adjudged the prosecutor to pay the costs of the prosecution. From this judgment he appealed to the Supreme Court, and the Court held that the statute authorizing the prosecutor to be taxed with the costs of the prosecution, intended that the proof showing the prosecution to be malicious or frivolous, should appear from the proof on the trial of the case. The Court did not intimate what character of proof should be heard, and in fact the question raised by this record did not and could not arise in the case of *Frazer v. State*.

The question, to some extent, was raised in the case of *State v. Green*, 2 Head, 357. It appears that Green was the prosecutor before a Justice of the Peace of one Palmer, of the crime of malicious shooting. The defendant was discharged and the Justice taxed the prosecutor, Green, with the costs, because he found that such prosecution was malicious. Green thereupon removed the cause to the Circuit Court by writs of *certiorari* and supersedeas, where the Circuit Judge refused to investigate the grounds of the Justice's judgment, holding that no appeal or *ceritorari* would lie to remove the judgment of the Justice taxing the prosecutor with costs, into the Circuit Court. The Supreme Court, speaking through Mr. Justice Caruthers, held the Circuit Judge to be in error in refusing to revise the judgment of the Justice, or to review and determine whether the facts heard by the Justice warranted taxing the prosecutor with the costs, upon the ground that the

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prosecution was malicious. The Supreme Court held that the Circuit Court did have jurisdiction to revise the judgment of the Justice when the case was removed into that Court by *certiorari*, upon the facts as recorded by the Justice in the discharge of his duty as a committing tribunal. It seems that the Justice of the Peace did take down the evidence of the witnesses heard by him at the committing trial, in writing, and that in the Circuit Court this record of the evidence heard by the Justice was offered by the petitioner to sustain the allegations of the petition that his prosecution was not frivolous or malicious; but the Circuit Judge rejects such evidence upon the ground that the judgment of the Justice of the Peace for costs against the prosecutor was final and conclusive and could not be reviewed upon appeal to the Circuit Court, or on *certiorari* to that Court. As stated, the Supreme Court held the trial Judge was in error, and among other things said: "The prosecution should be very clearly without foundation, and that known to the prosecutor, so as to show that his motives were malicious and not for promotion of public justice, in instituting the prosecution, in order to subject him to the costs." The Supreme Court reversed the judgment of the Circuit Judge dismissing the *certiorari*, and remanded the case to the lower Court with directions to examine the evidence as recorded and decide the question upon its merits.

We gather from this case that, at the committing trial, the evidence of the State's witnesses, including the prosecutor, was reduced to writing by the Justice, as required by section 7021 of Shannon's Code, and that in the Circuit Court where the case had been removed by *certiorari*, the petitioner had a copy of such evidence and offered it to sustain the allegations of his petition that his prosecu-

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tion was not malicious or frivolous. This evidence was rejected by the Circuit Judge and the Supreme Court held the evidence competent and remanded the case to the lower Court to examine this written evidence and decided from it whether the Justice was authorized to tax the prosecutor with the costs because the prosecution was malicious or frivolous. What would have been the opinion of the Court if the evidence offered by the prosecutor to show that his prosecution was not malicious or frivolous, was in parol and not in writing, we cannot determine from the opinion, because the question was not made or decided in *State v. Green*. The learned Justice who decided that case does make this statement:

“The practice of re-examining the facts in the Circuit Court would, certainly, be inconvenient in cases where the evidence had not been written down by the Justices, as they are required to do by law. Where that is not done, we will not say how the law would be, as that is not the question now before us.”

But, we have that precise question now before us, and it is for the first time before any Appellate Court in Tennessee, so far as we are able to learn from our investigations, or counsel have cited us. Mr. Justice Caruthers does not even so much as intimate that it would be incompetent to prove in the Circuit Court by parol evidence, what the facts were that were heard by the Justice at the committing trial. There is no statute, as well as no decision, that goes to the length of even intimating that such parol evidence is incompetent on a re-hearing in the Circuit Court. As stated by Mr. Justice Caruthers, it is certainly inconvenient to hear such parol evidence in the Circuit Court; but while that is true, it is likewise as inconvenient, if not more inconvenient, to reduce to writing

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the evidence heard by the committing magistrate. As is well known, the Justices are usually and generally men of limited learning, and of poor accomplishments in the way of writing, and if they were absolutely required to reduce all the evidence to writing heard by them at a committing trial, and no other such evidence was competent in the reviewing Court, then it would amount to practically a denial of a re-hearing of the facts in the Circuit Court for the purpose of determining whether the Justice was warranted in taxing the prosecutor with the costs or not.

We know, as well as every lawyer and judge knows, that the practice of reducing to writing by the magistrate the evidence heard by him on committing trials, has grown obsolete and is not often, or if ever, done by the Justices. In the course of a practice covering a period of more than forty years, the writer of this opinion has never seen, known or heard of a case where section 7021 of Shannon's Code was complied with by the Justice at a committing trial. And we doubt if any member of this Court as now constituted, ever knew or heard of such thing having been done at a committing trial by a Justice of the Peace. While the statute seems to be mandatory in its terms, yet, Justices have always construed it to be only directory, and the profession generally has placed that construction on this statute. In a city like Nashville, Memphis, Knoxville or Chattanooga, where there are large numbers of Justices, and where there are a great many committing trials, if they were required to reduce to writing the testimony heard by them at such trials, or to have it done under their direction, the time consumed in such work would take nearly all of the time the Justice had to devote to the discharge of the duties of his office. Because of the trouble in doing this, and because of the time necessary to do it,

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and for many other reasons, the habit of complying with this section of the Code has been abandoned, and no Justice of the Peace now thinks of complying with the requirements of the statute in this respect. The statute, itself, is obsolete, neglected and its observance completely ignored. It is doubtful if there are many magistrates who know this duty is imposed upon them by the statute, and it is certainly true that but few, if any, of the public at large are acquainted with its requirements.

This being the situation, and it being the universal custom and practice of Justices to ignore the requirements of the statute, must a prosecutor be denied the right to have a judgment for costs against him, because the Justice thinks the prosecution frivolous, reviewed and reversed, when it is impossible for him to present written evidence of the facts heard by the Justice at the trial when he was taxed with the costs? Under such circumstances, to deny the prosecutor a right of review of such parol testimony as he may bring, would be inequitable and unjust, and in many cases work a great hardship. It would strongly tend to prevent the citizens from instituting prosecutions against supposed criminals. He would not undertake such prosecution, lest he would be taxed with the costs of the same and have no remedy to review and reverse a judgment against him for costs.

We have reached the conclusion that, on a *certiorari* to the Circuit Court, parol testimony of the facts deposed to by the witnesses in the committing trial, is competent to be heard by the Circuit Judge, in order to determine whether it was a case for taxing the costs against the prosecutor. Of course, such parol testimony is not the best evidence of the facts heard by the trial Justice, but in the absence of a written statement of the facts heard by the

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Justice, made by him or under his direction at the trial, we think the Circuit Judge should hear the evidence of witnesses present, as well as the evidence of the Justice before whom the case was tried, as to the facts testified to by the witnesses on such committing trial.

Under section 7611 of Shannon's Code, where the Court or the Justice of the Peace is of the opinion that the prosecution was malicious or frivolous, it is the duty of the Court, or Justice, to tax the prosecutor with all the costs of such prosecution.

The fact that the prosecution is malicious or frivolous should appear from the proof heard in the trial. 2 Swan., 535; 5 Humph., 515; 4 Haywood, 371.

As stated by Mr. Justice Caruthers in *State v. Green, supra*, "The prosecution should be very clearly without foundation, and that known to the prosecutor, so as to show that his motives were malicious and not for promotion of public justice, in instituting the prosecution, in order to subject him to the costs. . . . This law was intended only for strong and clear cases of malicious prosecution, unmixed with the proper motive, and is to bring offenders to justice for the public good."

We have reviewed the evidence heard and rejected by the Circuit Judge in this case, and it seems to us that the prosecutor made out a case before the committing Justice of a probable cause to believe the defendants guilty of the offense of disturbing public worship, and for that reason it would appear that the prosecutor should not have been taxed with the costs of such prosecution. We are unable to find anything in the testimony of the Justices of the Peace who heard these cases, that indicates that the prosecution was frivolous or malicious. In fact, the judgment of the Justice, Mr. Gant, does not show that such

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prosecution was frivolous or malicious, and such judgments are probably void. As there is no law authorizing the judgment against the prosecutor for the costs of a criminal prosecution, except section 7611, *supra*, it would seem that where the Justice taxes the prosecutor with the costs, his judgment should recite that it appeared to him that the prosecution was either malicious or frivolous, in order to make it a valid judgment. But as this question is not raised in this record, we do not decide it.

We might, so far as the cases that were heard by Justice Turner, proceed to enter such a judgment in this Court as the Circuit Judge should have rendered, since we find the excluded evidence of the prosecutor preserved in the bill of exceptions, which, with the testimony of the Justice Turner, looks like they make out a case of a prosecution by McLain in good faith, and not one that was frivolous or malicious. But, we have decided to reverse these cases, there being two of them, and remand them to the Circuit Court of Bedford County for a re-hearing by the Circuit Judge upon the parol evidence offered by the prosecutor, McLain, for the reason that we think his situation is better to determine the question involved in these suits, after hearing all of the testimony and seeing the witnesses, than we can do after reading simply what it is written the witnesses testified before the Circuit Judge.

It results that the case is reversed and remanded to the Circuit Court of Bedford County for new trial.

The State of Tennessee will pay the cost of this appeal, and the Clerk of this Court will make out and certify the same to the Comptroller for payment. The cost of the lower Court will await final determination of the causes in that Court.

McGuire v. Carlyle.

INEZ MCGUIRE v. M. T. CARLYLE, ET AL.

1. PLEADING IN PRACTICE. *Declaration. Conclusions.*

Declarations must be specific as to facts. It is not sufficient to state conclusions nor to use adjectives and adverbs only.

2. SAME. *Declaration against officials of school.*

A declaration against school officials for wrongfully expelling a pupil must contain averments showing the illegality of the expulsion. Allegations that it was done unlawfully, maliciously and arbitrarily will not suffice.

3. SCHOOL BOARDS AND TEACHERS. *Presumption of good faith in making of rules.*

School boards and school teachers are entitled to the presumption of good faith with respect to the making of rules and regulations for their schools and in requiring obedience thereto and in expelling pupils who do not obey.

4. SAME. *Personal liability.*

Such officials are not personally liable for mistakes made as to methods of conducting a school nor in expelling of pupils where they act in perfect good faith. Nor are they liable for having passed an invalid ordinance if enacted in good faith.

5. SAME. *Rule as to physical exercise.*

Such officials are not liable in damages to a pupil who has been expelled for refusal to comply with the regulation requiring the pupils to take a certain physical training every day upon the school grounds.

FROM PUTNAM COUNTY.

Appeal in error from Circuit Court of Putnam County.
C. E. SNODGRASS, Judge.

McGuire v. Carlyle.

V. E. BOCKMAN for Plaintiff in Error.

O. K. HOLLADAY and B. G. ADCOCK for Defendants in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

WE shall call the parties plaintiff and defendants, just as they appeared in the Court below. Plaintiff is a female minor about seventeen years of age and a resident of the incorporated town of Cookeville, of which town her father was and is a citizen and taxpayer. Defendant Carlyle was superintendent of the city schools of the town during the year 1914-15, and the other defendants were four of the six members of the Board of Education of the town. In February, 1915, plaintiff was expelled from the school by Carlyle, and his action in so doing was immediately ratified by the School Board. For this expulsion plaintiff instituted this suit to recover damages. A demurrer to her declaration was sustained by the judge and her action dismissed. From the judgment of dismissal she prayed and perfected her appeal and is here assigning errors.

The demurrer contains some ten objections to the declaration, but we deem it unnecessary to notice more than two of them. One of these objections goes primarily to the form and phraseology of the declaration, and the other to the question as to whether, all other matters out of the way, plaintiff stated any ground of legal complaint.

It was averred in substance in the declaration that plaintiff was entitled to the privileges of the city school and was an attendant thereat during the fall of 1914 and the winter of 1915, and that Carlyle was superintendent and his co-defendants were school directors appointed by the Mayor and Aldermen of the town under legislative Acts of

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1905, and were vested with the right and power to prescribe and enforce all needful rules and regulations for the management of the school; that the superintendent at first promulgated a rule requiring the girl pupils to run races on the public streets of the town, and that plaintiff refused to comply because she deemed the rule unreasonable and compliance therewith indecent, and that for this refusal she was expelled and had to resort to Court proceedings for restitution; that subsequently a new or different rule requiring the pupils to run races in the yard of the school building was established, requiring the running to be in a public place or where the participants could be seen by the public; that plaintiff still conceived this to be an unreasonable regulation and requiring improper conduct and making unwarranted demand upon plaintiff, and she again refused to submit, in consequence of which refusal she was suspended by the superintendent with the approval of the directors; and she averred that this action was unlawful, unwarranted, arbitrary, malicious, wilful and in disregard of her rights.

The first criticism of the declaration urged upon demurrer to which we shall direct our attention is that the pleader in this case resorted to generalities, conclusions, adjectives and adverbs and omitted the statement of facts tending to show that the defendants had acted in such way as to subject themselves to suit. We are constrained to coincide with the views thus expressed. It is true that the doings of the school superintendent and directors were unusual, but at the same time they are trustees and entitled to the presumption of good faith, of fair dealing, pure motives and impartial conduct; and this consideration is sufficient to call forth the ancient common law rule that a pleading must be construed most strongly against the pleader. This rule does not now obtain universally, but

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it is of immense service in some cases. For instance, the defendant directors are serving from patriotic motives and are presumed to be governed by the best interests of the schools of their town, and their conduct and resolutions should be looked upon as the result of purely charitable and unselfish considerations. Hence, a party who complains in a Court of law of violation of their trust should be specific as to the facts impugning their motives and their conduct. The presumption must also be indulged that all regulations by them respecting pupils are reasonable. *Kinzer v. Toms*, 3 L. R. A. (N. S.), 494; *Powell v. Board of Education*, 37 Amer. Rep., 123; *Fertch v. Mitchener*, 60 Amer. Rep., 709. They are not liable for mere mistake of judgment, nor for an unwise policy. They can be subjected to damages only when they act arbitrarily, wantonly or maliciously in expelling a pupil. 35 Cyc., 1143.

Turning to the declaration here, we find that plaintiff was turned out of the school for non-compliance with the rule respecting play or physical exercise. She omits any averment to the effect that she is physically unable to comply, or that she was required to observe this rule at inopportune times; and there is an entire failure to allege that either the superintendent or the directors had any particular ill-will toward her, or that they had singled her out for the purpose of excluding her alone from the schools. Under these circumstances, the presumption of good faith and impartiality above mentioned must attach, and this presumption is not overcome by the use of adverbs, adjectives and conclusions. These latter can never supply the place of facts. *Drake v. Hagan*, and *White v. Railroad*, 108 Tenn., pages 265 and 745, respectively; see, also, Elliott, General Practice, section 425; also, 31 Cyc., pp. 52-56.

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It must be recalled that this is a suit for damages for wrongful, wilful and malicious conduct upon the part of the officials. There must be averred something that will justify these imputations, these charges of bad faith and arbitrariness. We do not believe that this can be done by the use of generalities and of epithets. We are speaking with peculiar reference to actions for damages for abuse of official power and trust. In such cases there can be no right of action in the absence of deliberate wrong doing. Even in Courts of law, trustees are entitled to the presumption and the indulgence of the beneficiaries of the trust.

We are not dealing with cases where pupils are seeking restoration to schools from which they have been expelled by the unlawful or unauthorized but mistaken acts of school officials. In such cases, the rights of the party will be determined without reference to motives, good or bad. But this is not so when the pupil is suing for a tort. In the case at bar the directors were undoubtedly officials, and their positions should be assimilated to those of municipal councilmen. They are never subject to suit at the instance of individuals for having passed invalid ordinances. 28 Cyc., 470. For these reasons we are of opinion that learned counsel drafting this declaration failed to allege facts which would justify a Court in awarding damages against the defendant. We can only account for this omission by the assumption that there were no facts to be pleaded.

But if we have to face squarely the other proposition advanced in the second ground of demurrer which we shall notice, we are persuaded that the lower Court was not in error in dismissing the suit. This regulation is singular, and there was doubtless the straining of some points or powers to justify the expelling of a girl for non-compliance.

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But yet we are unable to say that the regulation is an unreasonable one. In this day and time efficiency is the watchword of the schools, and this efficiency is not confined to the training of mental faculties only. It has become an accepted truth that there can be no sound mind in an unsound body, or at least that it is just as necessary to develop, train and preserve the body as it is to unfold the mental faculties. Men and women are in a large measure the outcome, both physically and mentally, of early training; and it is not a far-fetched conclusion to say that the neglect of the body in youth or the failure to acquire grace and agility, will impair the chances of the unfortunate one in after life. Hence, the wisdom of leaving to school teachers and school trustees the discretion as to the physical lines that should be observed or followed by pupils.

We are beginning to realize that in some respects the Persians, Spartans and Grecians proper were ahead of us in some educational aspects. At least they trained their young both mentally and physically, and with the view to their spheres in life upon reaching manhood and womanhood; and we should profit by their example and teaching as we are profiting every decade by innovations in the training of the young. It may seem strange that running exercises could be part of a school curriculum, but this would be a narrow view. We are unable to foretell the benefits, nor can we predict the ill effects of non-observance of such practices. Hence, the wisdom of submitting our young to the dictates of the trustees of the funds set apart for their education.

We took occasion to examine some of the books devoted to school management and found them of service in arriving at our conclusions in this case. For instance, we ascertained that those who have written upon the subject, espe-

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cially with reference to public schools, have emphasized the necessity of prescribing physical exercises and methods of play. It is stated that school teachers or trustees who fail to make such arrangements are remiss in the discharge of their duties. And these are not mere assertions of the authors. It will be ascertained upon examining their books that they urge many valid reasons for making physical training and physical exercise a part of school duty or school lessons; and running in particular is mentioned as a very appropriate form of exercise. The poisonous condition consequent upon the congregating of pupils in hot schoolrooms is mentioned in connection with the necessity of requiring that each one get out in the open and breathe pure air in order to ward off the toxic effect of confinement. A failure of the pupil so to do will result in stupidity, languor or possible disease. From all these the teacher undertakes to guard the pupils by enforcing exercises which take them out of doors. See Eggleston and Bruere on Work of Rural Schools, and also Betts & Hall on the Health of the School.

We are reminded that both Germany and England have for a long time required certain physical exercises upon the part of school children. We must not lag behind.

If the directors may in the exercise of their functions prescribe such regulation as the one in question, the correlative duty of observance is imposed upon the pupils. It is apparent that all pupils must observe the reasonable regulations of the board or of the superintendent, or else confusion will result. In the case of girl pupils the threat of expulsion is the only means of coercing obedience. If refusal be continuous, the recalcitrant will have to be suspended.

We must not be understood as scorning the claims of modesty urged by the plaintiff. We at the same time know

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that there are no physiological reasons why she should be excused. It is not suggested that her performances are indecent or immodest, nor that she will lose caste or standing by observing these rules. The women of this country are coming out of their seclusion and are entering upon all the walks of man; and it is not unreasonable to require of them that they follow those methods of training which will bring them nearer the masculine standard in a physical sense. We are not now concerned with whether this will enhance their attractiveness; it seems to be universally believed that it will improve them physically.

It is well to bear it in mind that teachers are in *loco parentis*, and that they are particularly charged with the symmetrical training of children committed to their care. Parents should not object to rules and methods which will equip their children for the battle of life; and, hence, the logic of vesting school boards and school teachers with a wide discretion as to how the children shall be trained. For these are experts which society employs for that purpose.

Again, it should not be forgotten that schools are the institutions of the State ordained for the purpose of developing manhood and womanhood, and that these institutions are correlated with other functions of the State, and that the management should have large powers with respect to the way the pupil shall be developed for service in society.

The judgment of the lower Court is affirmed with costs. We shall state in conclusion that permanent expulsion; that is, expulsion for all time, is not generally recognized nor authorized by law, the law deeming temporary suspension sufficient for disciplinary purposes. We have treated the expulsion of the plaintiff as extending to the then scholastic year only.

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W. W. WORLEY AND WIFE V. JAS. S. BYRD, ET AL.

Affirmed by Supreme Court, 1916.

1. **WILLS, CONSTRUCTION.** *Technical words. Reversion and remainder.*

The real intention of the testator if ascertained will control the use by him of technical terms. For instance a party takes a life estate only, although the words used indicate a fee, where the testator uses other terms manifesting the purpose to give a life estate only.

2. **SAME.** *Life estate and interest in fee in remainder.*

A party to whom a life estate in land is given by will cannot claim an interest in fee in remainder unless the language clearly manifests that intention.

3. **SAME.** *Taking as heir. Heirs of body.*

In the use of the terms "heirs body" a testator manifestly intended children only, where he provided for grandchildren in another clause. A party cannot claim as a child and also heir of the body when the one through whom he claims is himself an heir and takes antecedent to the one who is claiming under a clause providing for heirs of the body. Grandchildren cannot claim as heirs of the body when their parent is living or is precluded from taking.

4. **CHANCEEY PRACTICE.** *Concurrent findings in bill for partition.*

The rule forbidding disturbance of the concurrent finding of the chancellor and master with respect to facts has no application to the report by the master in a bill for sale of lands that it is advantageous that the land be sold instead of being partitioned in kind.

5. **SALES FOR DIVISION.** *Life tenant. Right to force.*

A life tenant who also owns a share in remainder is not entitled as of right to a decree of sale for division over the protest of the other remaindermen; and the situation will be the same, although the life tenant demonstrate that a sale is greatly to his advantage.

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6. *SAME. Burden of proof and degree of proof.*

The burden is on a tenant in common seeking a sale of land for division to show by the clearest testimony that it is much more advantageous to all the parties to sell rather than to partition in kind. And it is likewise his duty to show that the land is not susceptible of partition in kind.

7. *SAME. Partition of lands held in remainder.*

There may be a partition of lands upon which there rests a life estate.

FROM WASHINGTON COUNTY.

Appeal from the Chancery Court of Washington County.
HAL HAYNES, Chancellor.

THAD A. COX for Complainant.

J. R. WORLEY, GUY A. CHASE and BEN H. TAYLOR for Appellees.

SPECIAL JUSTICE JOHN W. GREEN, sitting during disability of Justice Hughes, delivered the opinion of the Court.

DR. W. W. WORLEY died at his home in Johnson City a number of years ago, leaving a widow, Mrs. N. D. Worley, and the following children: Emma Mai Worley, Ada Harr, Lillie Berkholtz, Bessie Byrd, J. B. Worley, and W. W. Worley, Jr.

By the second clause of Dr. Worley's will he made the following disposition of a lot on Main Street in Johnson City:

"I give, devise and bequeath to my daughter Emma Worley a life estate in a certain town lot in the town of

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Johnson City, Tennessee, for the boundaries to which see deed executed by J. J. Adams and wife to W. W. Worley, January 12, 1881. She is to have the full benefit and enjoyment of same during her natural life. Upon her death the reversion of remainder is to go to and be vested in W. W. Worley, Jr., for his natural life. He is to have and enjoy from thence forward the full benefit and use of same during his natural life. Upon his death the same is to go to and be vested into the heirs body of my wife N. D. Worley by me."

The bill in this case is filed by W. W. Worley, Jr., for the purpose of having the above mentioned clause of his father's will construed, and the said lot sold for partition. Complainant's mother and his sisters, Mrs. Harr and Mrs. Berkholtz, are dead, and the heirs of his deceased sisters are made parties defendant to the bill. All the parties interested in the property, except the complainant and his brother, J. B. Worley, who has by deed of gift conveyed his interest to complainant, oppose a sale of the lot, and claim that it is susceptible of partition, and insist that it shall not be sold. The complainant, W. W. Worley, is the father of two minor children, and they have intervened in this cause by next friend, setting up the claim that they have an interest in the property. The usual order of reference was made by the lower Court, and the master in obedience thereto reported that in view of the fact that complainant is the owner under the will of his father of a life estate in the property, and also the owner in fee under the deed to the property of his brother, J. B. Worley, of an undivided one-fifth in the remainder, that the property was of such character and description that it could not be well partitioned in kind.

After the intervention of the minor children of W. W. Worley, Jr., additional proof was taken and the master

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made a supplemental report in which he says that he finds no good reason for changing his former report, and reiterates that the reason for reporting in favor of a sale is that the complainant, W. W. Worley, Jr., owns as life tenant more than one-half the entire property, and that this would leave less than 74 feet front to be partitioned between four and possibly five parties, and he does not think this can be advantageously done. Exceptions were filed by the defendants to the reports and the Chancellor upon the final hearing construed the will to give two life tenancies in the property in question, one in favor of testator's daughter Emma, now deceased, and at her death another in favor of complainant, W. W. Worley, Jr. He further decreed that the complainant took only a life estate in the property and no interest in the fee, and that upon the testator's death the fee vested in the testator's other children, subject to the two life tenancies, and that the complainant, as the owner of a life estate in the entire property, and one-fourth interest in the remainder in fee, derived by deed from his brother, J. B. Worley, was entitled to have the property sold, because the same could not be advantageously and equitably divided in kind, and because the interests of all parties would be best subserved by a sale and by a commutation of the life estate of complainant. The master was accordingly directed to advertise and sell the property. The complainant and all the defendants have appealed from the Chancellor's decree and have assigned errors, and the case is opened up in its entirety. Complainants' objection to the decree is that the Court erred in failing to so construe the will as to give him the fee to the entire property or in any event the fee to one-fifth in remainder in addition to what he had acquired under the deed from his brother, J. B. Worley. Complainants' children object to

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the decree because it fails to recognize that they have any rights whatever in the property. All the other defendants object to the decree because the Court ordered the property to be sold instead of divided.

The first question for our determination is as to the proper construction of the second clause of Dr. Worley's will, which we have quoted above. No other portion of the will seems to have any bearing upon the case, and the argument has been confined to this particular clause. It is manifest that the testator's daughter, Emma Mai, took the first life estate in the property, and that upon her death complainant, W. W. Worley, Jr., took the property for his life. The argument is made that complainant, W. W. Worley, Jr., under the sentence "upon her death, the reversion or remainder is to go to and be vested in W. W. Worley, Jr., for his natural life," takes the fee to the entire property. This is upon the theory that the words "reversion or remainder" implies a fee. This construction ignores the fact that the reversion and remainder is given only for the natural life of W. W. Worley, Jr., and that the sentence immediately following again limits his enjoyment to a life tenancy. We are of the opinion that this contention is without merit. The complainant, W. W. Worley, Jr., next claims that as an heir of the body he is entitled to share said property equally with the other children upon the termination of the life estate left to him. We are of the opinion that it was the intention of the testator to give W. W. Worley, Jr., simply a life estate in the property. The words "heirs body" we construe to mean children, and we do not see how the complainant after his death could be expected to take anything. Such a result would be equivalent to Dr. Worley saying to the complainant, "I give you a life estate in this property

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and after you are dead I also give you one-fifth of the fee." It is equally clear to our minds that the children of the complainant would not take anything under this clause of the will because the testator's children are the heirs of his body and the benefits are limited exclusively to them. The effect of this clause was to vest the remainder in fee in the testator's heirs, except complainant, immediately upon his death, and these grandchildren were not then his heirs. Besides, if they could take at all it must be as heirs of their father, and they could get nothing from him because he only has a life estate.

The remaining question for settlement is as to the divisibility of the property. Subject to the complainant's life estate there are four equal interests, viz.: the heirs of Mrs. Harr, the heirs of Mrs. Berkholtz, Mrs. Byrd and J. B. Worley. The proof shows that the lot fronts about 147 feet on East Main Street in Johnson City, and as a depth of about 120 feet. It is located in about one block of the principal business district of the city, and is worth now approximately \$7,500.00 to \$8,000.00, and its prospective value is greater. The street in front of the lot is paved. The proof shows that business lots in Johnson City usually have a frontage of 25 to 30 feet. The property in question could be divided into lots something over thirty feet in width, and the decided weight of the testimony is that such a division is practicable. Complainant is both deaf and dumb, and the main contention urged in behalf of a sale is that he had a life interest therein and that he is willing to take the present money value of his life interest, and that on account of his affliction it would be much more advantageous for him to get the money out of the lot than it would be to have the lot divided. The master in his report recommending a sale lays special stress upon these

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points, and also upon the point that the value of the life tenant's interest is equal to and would take half the lot, leaving only 74 feet front for division. This also we gather is the view taken by the Chancellor and it is pressed upon us with much plausibility by complainant's counsel. We do not understand that the complainant is entitled to one-half the lot in the way of a life estate. If the lot should be sold, it might be found that he as life tenant, considering his age, health and probable length of life, would be entitled to one-half the proceeds as the present cash value of his life estate, but this is by no means equivalent to saying he is thereby entitled to one-half the lot. It is also urged that the lot, if now sold outright freed from the encumbrances of the life estate, would bring a good price and such is the weight of the proof. It is claimed that the complainant and the adult and minor defendants (they, however, all resist a sale) would derive much greater benefit from the interest on the money than they can possibly derive from the land. It should be stated in this connection that the only improvement on the lot at the present time is an old house which the complainant occupies, and that the premises are practically unproductive and are encumbered by a lien to Johnson City for a paving tax which the life tenant seems unable to pay.

As already indicated, the Clerk and Master reported in favor of a sale and the Court confirmed his report. In view, however, of the further finding of the Master as to his reasons for reaching this conclusion which we have already set out, we do not consider the rule of concurrent finding to be applicable to the present case. We cannot understand why the defendants should one and all so strenuously resist a sale, if it would result as beneficially to them as complainant claims. They say they prefer the

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land to the money. Four out of the six witnesses testify that this property can be well divided into business lots. The two witnesses who favor a sale are the complainants himself and his brother, J. B. Worley, whose title has been conveyed to the complainant. We do not see how the fact of the existence of a life estate destroys its desirability. To hold otherwise is to make the welfare of the life tenant paramount to that of the remaindermen.

We may and do concede that if complainant, as life tenant, gets practically one-half the proceeds of the sale and in addition thereto, as the owner of J. B. Worley's interest, one-fourth of the remainder, it would be more advantageous from his standpoint to sell than to partition in kind. This would leave a comparatively small residue for division among the other heirs and deprive them of a valuable business lot apiece which will enhance in value as time goes on and the town improves. We do not understand that complainant's affliction cuts any figure in the case or that his interest must be considered to the detriment of that of his cotenants. We think the other tenants in common have the right to take their portions in severalty, encumbered with complainant's life estate, and await the course of events. If complainant dies tomorrow they get immediate possession. If he lives for years their possession is postponed.

The co-owner, seeking a sale instead of a partition, must prove his case by the clearest and most satisfactory proof. Each tenant in common has the right to a partition except where it is impracticable or where from the situation of the premises a sale would be manifestly advantageous to all parties interested. *Reeves v. Reeves*, 11 Heisk., 669. Shannon's Code, section 5042. In the case of *Wilson v. Bogle*, 95 Tenn., 293, the Supreme Court quotes with ap-

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proval from Freeman on Cotenancy and Partition, to the effect that "a sale will not be ordered without good cause. It is not sufficient that some or even a majority of the cotenants prefer a sale to a partition and such a state of facts must be shown as will rebut the presumption of law that each of the parties is entitled to an actual partition." Again, in the case of *Rutherford v. Rutherford*, 116 Tenn., 390, it is held that there can be no sale unless it is made to appear that it will benefit not only the life tenants but the whole estate.

For the reasons indicated we affirm the decree of the Chancellor as to the construction of the will, but we reverse him upon the question of partition. In our opinion the property is susceptible of partition and a decree will be entered accordingly. The costs of the appeal will be paid one-half by complainant and one-half by the defendants.

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J. M. HOLLAND v. NASHVILLE RAILWAY & LIGHT CO.

Writ of Certiorari denied by Supreme Court, 1915.

1. JOINT TORT FEASORS. *Negligence. Construction.*

There is no contribution among joint tort feasons. Therefore a declaration disclosing the fact that plaintiff is seeking contribution from a joint tort feason is demurrable.

2. SAME. *When parties are joint tort feasons.*

When it is shown that but for the negligence of the plaintiff there would have been no injury to a third party, the plaintiff must be regarded as a joint tort feason, notwithstanding the palpable negligence of a party from whom plaintiff is seeking contribution.

FROM DAVIDSON COUNTY.

Appeal in error from Second Circuit Court of Davidson County. M. H. MEEKS, Judge.

JNO. T. ALLEN for Plaintiff in Error.

ROBERT F. JACKSON for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS case is before us on writ of error. It is a suit by plaintiff in error to recover from defendant in error a sum he had been adjudicated to pay one Tally by reason of his automobile running against him and injuring him.

The basis of the action is that his automobile was caused, without fault or negligence on his part, to run against

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Tally by reason of the tracks of defendant in error being constructed and left in a greasy condition projected above the level of the streets in Nashville at the intersection of Cedar Street and Twenty-second Avenue, North, in said city.

There was a demurrer to the declaration which was sustained, and, as before stated, the case is before us on writ of error.

The original declaration filed in the case contained two counts. It was filed May 7, 1913. It was demurred to.

At the December term, 1913, of the Court below, plaintiff in error asked leave and was permitted to amend his declaration, and thereupon he stated in open Court that he abandoned his former declaration and would rely upon his amended declaration for a recovery.

His amended declaration, as it is called, avers, in substance:

1. That by defendant's careless and negligent management of its car tracks and roadbed at and near where its tracks on Twenty-second Avenue, in Nashville, intersect its track on Cedar, in failing to keep up said track and the street between and on each said track in proper state of repair on the ——— day of ———, 1912, plaintiff's automobile, which was being run and operated by plaintiff, slipped and skidded on said tracks and was diverted from its course on Cedar Street, and was caused to run against and over Walter Tally (col.), who was without fault, whereby Tally sustained serious personal injury, and Tally sued plaintiff for \$5,000.00 as damages for said injury in the Circuit Court of Davidson County, Tennessee.

2. Plaintiff in error was forced to defend said suit, and on its trial Tally recovered judgment against him for \$800.00 and the cost.

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3. That he moved for a new trial, which, being overruled, he appealed to the Court of Civil Appeals, in which Court the judgment was affirmed, and he had to pay the same and costs amounting to \$931.02, besides attorneys' fees amounting to \$200.00.

4. That defendant in error was not sued in said action, but was notified of the pendency of the suit, and that plaintiff in error would hold it liable to him for the amount he had to pay as the result of the suit; but it failed to make any defense to the suit and plaintiff in error was forced to defend it at his own expense by the employment of attorneys.

5. That plaintiff in error lost much valuable time and was greatly harrassed and embarrassed by said suit, and he insists that he is entitled to recover from defendant in error what he paid out as aforesaid as the result of the suit and for his loss of time and the inconvenience caused to him, all resulting from the negligence of defendant in error in the following particulars:

"The metal of the street between the rails of its track and on each side of said rails was worn and washed away until said rails were from an inch and a half to three inches above the surface level of the street, so that the wheels of the vehicle on the street would have to mount over said rails, and if said rails were wet or greasy, they would cause the same to skid and slip on said rails, which it knew, or would have known, had it exercised ordinary care, and, on the day of the aforesaid accident and immediately preceding it, defendant in error had said Tally as its employe, to grease said rails from the switch intersecting said track on Cedar Street along and around the curve into Twenty-second Avenue, and it was while said Tally was thus engaged on Twenty-second Avenue, near Cedar Street,

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that plaintiff in error, accompanied by two men in an automobile, was coming from West Nashville along Cedar Street into Nashville, operating the automobile at a lawful rate of speed in a lawful manner and exercising ordinary care, when he attempted to run the automobile over the tracks of defendant in error at the crossing of Twenty-second Avenue, so as to continue on Cedar Street, and said Tally did not appear ahead on Cedar Street in striking distance of the automobile and was not observed by plaintiff in error prior to the accident, although he was keeping a proper lookout ahead along Cedar Street; but when the front wheels of the automobile ran against and upon said rails to cross over said track, the automobile slipped and skidded suddenly to the right around the curve of the track into Twenty-second Avenue, and the same was thrown into such a twist by the quick and sudden turn, which was wholly unanticipated by plaintiff in error, that the automobile came near turning over and its occupants instantly put in great peril, whereby the attention of plaintiff in error and all his efforts for the time being to avoid the threatened danger, were engaged in trying to prevent the automobile from turning over until it had run down said Avenue and was about colliding with Tally, and it did collide with him before plaintiff in error had time to warn him of the approach of the automobile, or to stop it; and after the collision, plaintiff in error cared for Tally by taking him up and at his request carried him to Dr. Eve's Infirmary, where he received immediate attention and treatment for his injuries, which injuries were caused by the defective condition of said track of defendant in error as their proximate cause, and which could have been avoided by defendant in error by the exercise of reasonable care on its part.

This amended declaration was demurred to on five grounds.

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This demurrer was sustained by the trial Judge and the suit dismissed with costs.

From this action of the Court plaintiff in error has brought the case to this Court under a writ of error.

His assignment of error is that the trial Judge erred in sustaining the demurrer and dismissing his suit.

It is manifest that the suit of Talley against plaintiff in error in which he recovered was based on the proposition of fact, that the automobile of plaintiff in error was being negligently or recklessly operated when it collided with him, and that his negligence or recklessness was the proximate cause, or one of the direct contributing causes, of the collision and the resulting injury to him. If its operation was the sole efficient or proximate cause of the collision and injury, it must be conceded that plaintiff in error is alone liable in damages for the injury.

If its negligent or reckless operation, coupled with the defective condition of the tracks of the defendant in error at the place of the collision and injury to Talley, assuming Talley to have been free from defeating contributory negligence, was the proximate cause of the injury, then both plaintiff in error and defendant in error were liable in damages to Tally, and he could have sued either or both to recover his damages.

He sued plaintiff in error and recovered.

Assuming that both plaintiff in error and defendant in error were guilty of the negligence that caused the injury, plaintiff in error having alone been sued and a recovery had against him, can he claim contribution from defendant in error?

In the case of *Rhea v. White*, 3 Head, 121-26, it was held that there could be no contribution among wrong doers. In that case, Judge Wright said: "The equity of a con-

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tribution arises when several persons are bound by a common charge, not arising *ex delicto*, and their order of liability has been accidentally deranged. In such case, if the liability be joint, he who has paid more than his share is entitled to a contribution from the rest, but this equity can never exist if the charge be not binding or the liability arises *ex delicto*, for there can be no contribution between wrong doers."

The reason is that they may be intimidated from committing the wrong by the danger of each being made responsible for all the consequences.

The learned Judge cites *Merriweather v. Nixon*, 1 T. R., 186. *Peck v. Ellis*, 2 J. C. R., 131.

In the case of *Anderson v. Saylor*, 3 Head, 551, that able Judge, Judge McKinney, in delivering the opinion, said: "It is quite clear that the recovery against the defendants, being in damages for a tort, no right of contribution could exist in favor of either." In other words, the principle announced in the case was, that in a recovery against several defendants for damages for a tort, no right of contribution exists in favor of either, whatever may have been the nature of the case, or the apparent right of the one on principles of natural justice to have such contribution, or to throw the entire satisfaction of the judgment on the other party.

At bottom, the principle announced was that the satisfaction of a judgment by one of the joint defendants is an extinguishment of it as to all of the defendants, so that no execution can afterwards be issued thereon.

The learned Judge cites the case of *Rhea v. White*, 3 Head, *supra*, and *Maxwell v. L. & N. Ry.*, 1 Tenn. Ch., 14.

While other authorities in some jurisdictions are apparently not in harmony with the decisions just cited, we

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are aware of no case in this State overruling or modifying them.

Assuming that these cases state the law of this State, it is obvious that plaintiff in error is not entitled to recover against defendant in error, and that the learned trial Judge was correct in sustaining the demurrer. This result follows from whatever view of the case that may be taken.

R. L. & R. C. WALKER, EX REL. v. TOWN OF COOKEVILLE.

1. MUNICIPAL TAXATION. *Charter fixing rate. Power to exceed.*

Where the charter of a municipal corporation expressly limits the tax levy to a certain rate per year, there is no implied power to exceed this limit, even to raise funds for the payment of debts.

2. SAME. *Remedy of debt holder.*

A party who has a *bona fide* debt against a municipal corporation may by mandamus compel the authorities to provide for his debt in their tax levies and to arrange payment; and where there is tax limit beyond which the authorities cannot go, the debt holder's obligation must be met out of funds raised within the limit.

FROM PUTNAM COUNTY.

Appeal in error from Circuit Court of Putnam County.
C. E. SNODGRASS, Judge.

Walker v. Town of Cookeville.

H. S. BARNES for Plaintiffs in Error.

ADCOCK & SON for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS is a mandamus proceeding filed upon the relation of the Walkers to compel the Mayor and Aldermen of the town of Cookeville to pay a judgment in their favor, or to set apart a sufficient amount of the corporate revenues to pay it, or to compel the city authorities to levy a tax sufficient to pay off said judgment and the accrued interest thereon. An alternative writ was issued, which was served upon the defendant corporation, when it filed its answer, in which it is stated that the Mayor and Aldermen of the town of Cookeville then had no money in its treasury with which to pay the judgment of relators, nor any material part of it. As a further defense it is stated that the charter of the town of Cookeville that authorized it to levy taxes, limits the amount of taxes to be levied by it for one year to one dollar upon every one hundred dollars worth of taxable property within the corporate limits of said town, and it is then stated that it has, for the last two or three years, assessed and levied taxes upon the property within the corporate limits to the full amount authorized by the Legislature of the State in the charter granted it, and for these reasons it insists that it cannot be required to assess and levy a tax in excess of the amount allowed it in its charter.

Upon filing this answer, the relators moved for a peremptory writ of mandamus, notwithstanding the averments of said answer. The Circuit Judge, after hearing said motion, sustained it, upon the ground that the answer was insufficient, and, thereupon, a judgment was entered in favor of relators against the defendant corporation for

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\$579.55, with interest, and the Clerk of the Court was ordered to issue a peremptory writ of mandamus as prayed for in the petition, compelling the Mayor and Aldermen of the town of Cookeville to levy a special tax, sufficient to pay off in full this judgment, together with all the costs of the cause. The Mayor and Aldermen appealed from this order or judgment of the Circuit Court, and have assigned errors to the action of the Court in ordering the peremptory writ of mandamus to issue, notwithstanding its answer to the petition.

A number of errors have been assigned, but each of them raise substantially the same question, which is, whether or not the Mayor and Aldermen of the town of Cookeville can be compelled by mandamus proceedings to levy and collect a special tax with which to pay the judgment of relators when its charter limits the rate of taxation for all purposes at one dollar on each one hundred dollars worth of taxable property within the corporate limits.

It is clear that the trial Judge was in error in rendering a judgment in favor of the plaintiffs against the defendant for the amount stated. It does not appear, either in the petition or in defendant's answer thereto, for what purpose this judgment or debt was created, that is, it is not shown whether it is a debt contracted by the city authorities or is based on a liability for a tort. It simply appears that a warrant had been issued by the corporate authorities to the relators on the 8th of September, 1910, due and payable twenty-four months after date for \$——. It next appears that, on the 13th of April, 1914, the relators obtained a judgment on this warrant against the defendant corporation for \$479.55, and that an execution had been issued on this judgment and returned by a constable of Putnam County, not satisfied.

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It is admitted in the brief of learned counsel for the city, that the debt on which the judgment is based, was created for a corporate purpose, though it is not shown for what purpose or purposes such debt was created.

The town of Cookeville was incorporated by an Act of the Legislature, passed April 8, 1903, and approved April 15, 1903, as appears from Chapter 542 of the Acts of the Legislature of that year. Under Article I, Section 2 of the charter, the Board of Mayor and Aldermen is given the power to levy and collect taxes for the purpose of carrying the necessary measures into operation for the benefit of said town. Other powers are granted it in said section of the charter, such as "To grade, pave and keep in repair the streets and alleys, pass all necessary laws for the same," and other special powers are therein conferred upon the municipality.

Section 2, of Article 7, of the charter of Cookeville is in the following language:

"Be it further enacted, That in making the tax levy, said Board of Mayor and Aldermen shall not fix the total levy for all purposes for any year at a higher rate than one dollar on the one hundred dollars of the assessed value of the property, which shall include both corporation and school tax as hereinafter provided."

Under Section 4, of Article 7, it is provided that those living within the corporate limits of the town and were subject to a road duty on the public roads of Putnam County, should pay a special road tax for the purpose of keeping up the streets of said corporation, to be fixed by the Board of Mayor and Aldermen, and not to exceed three dollars per year. It is also provided in said section, "That all persons who live within said corporation who are subject to a poll tax, shall pay the sum of one dollar

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as poll tax, which shall go to the benefit of the public schools within said corporation."

Under Section 2, of Article 9, the Board of Mayor and Aldermen is authorized "to levy and collect a special tax for school, . . . which shall not exceed fifty cents on the one hundred dollars' worth of taxable property, as hereinbefore provided."

Under Article 11, provisions are made for the issuance of coupon bonds not exceeding \$25,000.00, for the purpose of establishing waterworks and electric light plant, and for building or paving streets, sidewalks or sewers, and for the purpose of buying machinery and material for the above purposes, or any or all of them. Under Section 4, of Article 11, the Mayor and Aldermen are given authority to levy a "special tax to be designated the sinking fund tax, to be collected annually, and to be used exclusively for the purposes levied." No authority is given in the charter to the Board of Mayor and Aldermen to levy a special tax for the purpose of paying the interest on the bonds authorized to be issued under Article 11.

It thus appears that the corporation has the general power conferred upon all municipalities in this State, to levy and collect taxes for corporation purposes. In addition to this general power, it is granted authority to levy a road tax on each individual living within the corporate limits of the town and subject to road duty on the public roads of Putnam County, which tax is not to exceed three dollars per year. It also has the power to levy and collect one dollar as a poll tax from all persons living within the corporation who are subject to the payment of such tax. The next special authority granted is the power to levy a special tax for school purposes, not to exceed fifty cents, and then finally it is given authority to levy a special tax

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to be designated as the sinking fund tax. This latter tax does not seem to be limited as to the rate of taxation.

It is insisted by counsel for the city of Cookeville, that it is powerless to levy and collect a greater rate of tax than one dollar on the one hundred dollars' worth of taxable property, including the school tax provided for, which is not to exceed fifty cents on the hundred dollars' worth of taxable property; and having levied this one dollar, it has no right under its charter or the general laws of the State, to levy any further or additional tax than what it has already levied under the provisions of its charter. The charter having said the Mayor and Aldermen shall not fix the total levy for all purposes for any year at a higher rate than one dollar, it is insisted that when the Board has exercised this power, it has exhausted all the power it has, and cannot be forced to levy a special tax to pay the judgment of relators, when to do so would require a greater rate of taxation for the year than one dollar on the one hundred dollars' worth of taxable property within the corporate limits; and this is the legal question now before us for determination.

It has long been settled by many adjudications, that the power of taxation is a sovereign power, and belongs alone to the Legislative Department of the Government. When the States exercise the power of taxation, they are then exercising the power of sovereignty. Municipal corporations have no inherent power to levy taxes, and have only such power as is conferred upon them by constitutional, statutory or charter provisions. It has often been adjudged that the power to tax need not be expressly conferred on municipalities, but may be implied from the grant of other powers. If there is no constitutional provision to the contrary, the Legislature has the power to delegate to the Board of Mayor and Aldermen of the cor-

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poration, the authority to levy taxes for local purposes within its corporate limits. Having the power to levy taxes themselves, the State may delegate a portion of its power to municipalities, which are arms of the government, to tax property within its corporate limits to be used for local purposes therein. 28 Vol. Cyc., pp. 1658-1959; 4 Dillon on Municipal Corporations, Sections 1377-1378; 2 Lea, 443-445.

In Cyc., Vol. 28, p. 1661, it is said: "Statutes conferring upon municipal corporations authority to impose taxes must be strictly construed. If the authority . . . to levy and collect a tax is doubtful, the doubt must always be resolved against the tax," citing a number of authorities in support of the text.

That the power to levy a tax by a municipal corporation may be implied, though not expressly given, seems to be well settled. In 28 Cyc., p. 672, it is said: "The Legislature may by implication, grant a municipal corporation the power to levy taxes to pay municipal debts, unless there is some provision in the Constitution requiring such grant of power to be in express terms." The instances where such implied power exists, is where the charter of the corporation grants it the power to create a debt for some specified object, or to issue bonds to pay certain indebtedness, or to carry out some corporate purpose. In such cases, where the charter makes no special provision for the payment of the debt or bonds, the municipal authorities are necessarily clothed with the implied power to levy a sufficient tax to discharge such a debt.

In the case of the *Mayor and Aldermen of Bristol v. Dixon*, reported in 55 Tenn., 864, the Supreme Court of this State, speaking through Chief Justice Nicholson, held that, where a power was granted in the charter of a corporation to create a debt for certain corporate purposes, the

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power to levy a special tax to pay such debt was necessarily implied.

In the *State v. Mayor and Aldermen of Bristol*, 109 Tenn., 324, the Court again said: "We think it is a sound principle of law that, where an Act of the Legislature confers upon a municipal corporation power to issue bonds, it impliedly authorizes the levy of sufficient taxes to meet the debt, unless the Constitution of the State prohibits such implied power, or the statute authorizing the debt, or some general Act, contains some provisions which rebut such implication."

But does this petition make a case for the exercise of implied power to levy a special tax? Or is it shown in the petition that the debt mentioned therein, or the judgment rendered thereon, was created in the exercise of some special power conferred upon the corporate authorities of Cookeville? As we have said, the only way we have to learn whether this debt was created for a corporate purpose or not, is from the concession of learned counsel for the corporation in his brief. The debt may have been created or due for the ordinary and usual expenses incident to the exercise of the usual powers conferred upon corporations. It is not shown that it was created by contract made for the grading, paving or keeping in repair the streets of the town, or in opening and locating the same. It does not appear that this particular debt was incurred in the establishment of waterworks, or the building of sewers in said city limits. All we know about it is that it was created for a corporate purpose. It may be a debt due the Marshall of the town as a part of his salary, or a debt created for the per diem due to the Mayor and Aldermen of the city.

In the case of *Mayor and Aldermen v. Dixon, supra*, it appears from the opinion of the Court, that the debt of

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the town for the payment of which the special tax was sought to be levied, was created and incurred in the improvement and repair of the streets, the city charter having granted them the power to improve and repair the streets. Mr. Justice Nicholson held, in that case, that the grant of the power to improve and repair the streets carried with it the implied power to levy a special tax to pay whatever debts were created in the exercise of such power. He says: "To satisfy the debt so contracted, they have ample power to levy and collect the necessary amount of taxes. The taxes so levied and collected require no express power, nor are they such special taxes as are subject to legislative restriction."

It would seem from the opinion in *Mayor and Aldermen v. Dixon*, that the town of Bristol was organized under the general incorporation laws as they are found in Sections 1359 *et sequi* of the Code of 1858. In Section 1360 of that Code, the power of corporations organized thereunder, in taxing polls and property could not exceed the rate levied by the State at that time. The charter of Cookeville, however, was expressly granted by an Act of the Legislature, as we have heretofore stated, and in this charter the rate of taxation is expressly limited. "For all purposes for any year, to one dollar on the one hundred dollars' of the assessed value of property within the city limits." This charter has a grant of power to the corporate body to levy a special tax for school purposes, and also a special tax to create a fund with which to pay certain bonded indebtedness therein authorized; but the Legislature delegated to the Board of Mayor and Aldermen of Cookeville only the power to levy a tax of one dollar on the one hundred dollars of the assessed value of the property, and expressly said the total levy for all purposes shall

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not exceed that rate. Is this not an express inhibition on the Board to go beyond one dollar for any one year?

In 28 Volume of Cyc., p. 668, it is said: "The general rule is, that taxes cannot be imposed for special purposes, as distinguished from general municipal purposes, except where power to impose such taxes is delegated either expressly or by necessary implication." Under a delegated authority a municipality may levy a tax for a public improvement, and where a street improvement inures to the benefit of all the taxpayers, its cost may be taxed as a common charge against all of them; but as we have said, it does not appear from this record for what purposes this debt was created.

In the 4th Vol. of 5th Ed. of Dillon's work on Municipal Corporations, that learned author says: "It is not unusual in the organic acts of municipalities for the protection of the citizens, to limit the rate of taxation or the amount of taxes that may be raised during any one year; and where the power is thus limited, it is not ordinarily enlarged by implication by other provisions of the charter, general in their nature, conferring the power to make contracts and to incur liabilities, or even giving authority to make improvements, or to erect usual or ordinary buildings," and for this statement of the rule, quite an array of authorities are cited by the learned author.

In the present case the organic act of the charter of the town of Cookeville limits the rate of taxation or the amount of taxes that may be raised, during any one year, and, according to Dillon, this limitation is not enlarged by implication by any other provisions of the charter, general in their nature.

In Section 1508 of the 4th Volume of this work it is again said: "Where a bonded debt is authorized, and the power of taxation for its payment is limited by the en-

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abling act itself, or by the general statutes in force at the time, to the special tax designated in the act, there is a want of power to levy any greater tax than the one thus specially provided and limited."

It appears from the case of *Carroll County v. United States*, in 18 Wall, U. S. E., 71, that this question was before the Supreme Court of the United States, and it was there held that where counties were limited in their power of taxation to a rate not more than four mills on the dollar, such counties could not be compelled by mandamus to levy a special tax in excess of the four mills to pay a judgment obtained on one of the warrants issued by the proper county authorities, and this case is cited by Mr. Dillon in Section 1525 of the 4th Volume of his work on Corporations.

Inasmuch as the charter of the town of Cookeville expressly limits the rate of taxation for all purposes, including the fifty cents rate for school purposes, to one dollar on the one hundred dollars of taxable property in the city, we have reached the conclusion that the Board of Mayor and Aldermen of Cookeville has no power to exceed the rate fixed in the charter, and that, therefore, the Courts would have no authority by mandamus proceedings to compel such Board to levy a special tax in excess of the charter rate, and, therefore, that the judgment and order of the Circuit Court ordering and directing the Board of Mayor and Aldermen to levy and collect a special tax to be used in paying the judgment of the relators, was error, and must be reversed, set aside and annulled. But while we have reached this conclusion, we feel that relators are not entirely without a remedy. They have what is admittedly a just debt against the town of Cookeville, and it should be paid, and the only excuse offered for not paying it is that the town is limited in its power of taxation. While

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the answer states that the Board has, for two or three years preceding the date of the filing of the petition, assessed and levied taxes upon the property within the corporation of Cookeville to the full amount authorized by the Legislature of this State; yet the answer does not show any reason why some of the funds collected from such tax have not been used in the payment of this judgment. No excuse is offered, nor any explanation tendered, as to why a portion of the revenues of the corporation have not been used and applied in the discharge of this just debt. It was created on the 8th of September, 1910, and a warrant issued to cover it was made payable twenty-four months after that date, thus giving the city authorities two years' time in which to raise the money by lawful taxation with which to pay the warrant. This petition was filed the 12th of November, 1914, more than four years after the warrant issued to relators covering this debt was dated. It is manifest that the debt was created some time prior to the issuance of the warrant, and in all these four or more years the Board of Mayor and Aldermen of Cookeville have taken no steps whatever to pay this just debt. It is not even stated in the answer what disposition has been made during that time of the revenues collected, whether applied to the proper discharge of current expenses or whether misapplied.

For these reasons we have reached the conclusion that relators are entitled to a peremptory writ of mandamus, as prayed in their petition, requiring the defendant, the Mayor and Aldermen of the town of Cookeville, to pay off within a reasonable time, after such mandamus is served upon them, the judgment of relators and all interest accruing thereon. Such peremptory writ of mandamus will likewise order and command the defendant, the Mayor and Aldermen of the town of Cookeville, to set

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apart a sufficient amount of its fund or revenue derived from legal taxation, with which to pay the judgment of relators and the interest thereon, and that such fund so set apart shall be used exclusively in paying the judgment and interest thereon until it is fully discharged.

This case will be remanded to the Circuit Court of Putnam County for the issuance of such peremptory writ of mandamus, and to see that the defendants, the Board of Mayor and Aldermen of Cookeville, as promptly and speedily comply with it as the revenue collected by the city authorities will permit it to so do.

In order that there be no misunderstanding, let the peremptory writ command the defendant to set apart for payment of this judgment, the first revenues realized and collected by it from lawful taxation, after the writ is served upon the proper officers of the town.

The costs of the lower Court will be paid as adjudged by that Court. The cost of this appeal will be paid as follows: One-fourth by the relators and three-fourths of it by the Board of Mayor and Aldermen of the town of Cookeville.

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GROCERS & MERCHANTS' BUREAU v. W. E. GRAY.

1. **PRACTICE OF LAW.** *Unlicensed party. Corporation retaining lawyer to represent it.*

No individual, corporation, bureau or partnership, composed of individuals who are not licensed to practice law, may in this State perform any of the functions of a lawyer and collect fees therefor.

2. **SAME.** *Employment of an attorney by layman.*

No such person or persons may lawfully engage the services of a licensed attorney to represent their clients and thus evade the laws with respect to admission to the bar.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County. THOS. E. MATTHEWS, Judge.

W. D. COVINGTON for Plaintiff in Error.

NORMAN FARRELL, JR., for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS action originated before a Justice of the Peace of Davidson County, and was brought by the Grocers & Merchants' Bureau of Nashville against the defendant in error to collect the sum of \$10.00, growing out of a certain written contract filed as Exhibit "A" to the agreed statement of facts entered into between the parties, and upon which the case was tried in the Court below, and which is made a part of the record upon this appeal. Said written con-

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tract was entered into on June 25, 1914, between the plaintiff in error and the defendant in error, Dr. W. E. Gray, who is a colored physician residing in the City of Nashville, Tennessee.

The defendant in error defended the suit upon the ground that said contract was contrary to the public policy of the State, and was, therefore, illegal and void.

A trial of the case in the Court below before the Hon. J. B. Daniel, Special Judge, without the intervention of a jury, resulted in a dismissal of plaintiff in error's suit, and it was taxed with the costs thereof. From this judgment it appealed to this Court, after its motion for a new trial had been overruled, and errors have been duly assigned.

The plaintiff in error is a collection agency incorporated under chapter 58 of the Acts of 1901, providing for the organization of corporations for the purpose of conducting commercial, mercantile and protective agencies for the collection of debts. And for the purposes usual and appropriate to the business of such agencies.

The contract solicited by the plaintiff in error and entered into with the defendant in error on June 25, 1914, provides that in consideration of \$10.00, to be paid monthly thereafter at the rate of eighty cents per month by the defendant in error, the plaintiff in error will furnish "the following improved and strictly up to date service: (1) Rating book, (2) supplements, (3) standing of newcomers, (4) special reports in Nashville, (5) special reports in Tennessee, (6) list of bankrupts, (7) free notary work, (8) free legal advice regarding commercial matters, (9) to keep office open every Saturday evening until six o'clock."

It appears from the agreed statement of facts that said \$10.00 were never paid, and were due under the terms of

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said written contract at the time the present action was brought.

It was the insistence of the defendant below that plaintiff in error was engaged in the practice of law and contracted, among other things, to perform the services of an attorney and counsellor at law for the defendant; that such a contract is illegal in Tennessee, except when made by a duly licensed attorney; and that the contract being illegal in part and the consideration being entire, the whole contract was vitiated. It was further insisted that the contract was also void upon the ground that it was solicited by the plaintiff in error.

The agreed statement of facts shows that plaintiff in error employs a reputable and competent member of the Nashville bar to give its clients the legal advice which it contracts to furnish its subscribers or patrons. And it is insisted by counsel for plaintiff in error that, in pursuing this course, it was not in any sense holding itself out as an attorney or counsellor at law, nor is it engaged in the practice of law, but only hires a lawyer to give its clients legal advice, which, it is insisted, is in no way contrary to public policy. It is conceded by counsel for plaintiff in error that a corporation is not eligible to practice law in this State.

We think this is undoubtedly true, as our statutes upon the subject only apply to natural persons who must be twenty-one years of age, and of good moral character, and shall stand the examination prescribed by the State Board of Law Examiners, and shall have been duly licensed as required by chapter 247 of the Acts of 1903, and Shannon's Code, section 5772.

The question presented upon the agreed statement of facts is, whether the services undertaken to be performed

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by the plaintiff in error under the eighth item of said contract constitutes an undertaking to practice law within the meaning of our statutes, and within the legal significance of that term.

In the matter of the *Co-operative Law Co.*, 198 N. Y., 479, 19 Am. & Eng. Ann. Cas., 879, a corporation was chartered "to furnish to its subscribers legal advice and service; to operate in connection with the above a department of law and collections for the use and benefit of the subscribers of the company only."

The Bar Association of the City of New York intervened to have its charter vacated, and the Court of Appeals, in vacating the charter, said:

"The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a State Board appointed for that purpose. The right to practice law is in the nature of a franchise from the State conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the Court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the Courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it

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cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate. *Quando aliquid prohibetur ex direct, prohibetur et per obliquum.* Co. Litt., 223."

"The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to the corporation, and the attorney would be responsible to the corporation only. His master would not be the client but the corporation, conducted it may be wholly by layman organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counsellor at law. The corporation might not have a lawyer among its stockholders, directors, or officers. Its members might be without character, learning, or standing. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, no stimulus to good conduct from the traditions of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the State."

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"A corporation can neither practice law nor hire lawyers to carry on the business of practicing law for it, any more than it can practice medicine or dentistry by hiring doctors or dentists to act for it."

We have quoted from the opinion in the above case at length, because the case is directly in point, and the opinion sets forth some most wholesome reasons why a corporation cannot practice law, either directly or indirectly, all of which this Court heartily approves.

In *People v. John H. Woodbury Dermatological Institute*, 129 N. Y., 454, 85 N. E., 697, it was held under the New York statute (Laws of 1907, chapter 344, section 15), providing that "any person not a registered physician who shall advertise to practice medicine shall be guilty of a misdemeanor," that a corporation organized under an Act authorizing incorporation for manufacturing, mining, or chemical purposes might be convicted for advertising to practice medicine.

In *State Electro Medical Institute v. State*, 74 Neb., 40, 12 Am. & Eng. Ann. Cas., 673, it was held, under a statute of the State of Nebraska requiring a license for the practice of medicine, that a corporation is not such a person as can obtain a statutory license to practice medicine in said State.

In *Hannon v. Siegel-Cooper Co.*, 167 N. Y., 244, 52 L. R. A., 429, it was held that a corporation could not engage in and advertise that it was practicing dentistry.

In *Re Duncan*, reported in 83 S. C., 186, 18 Am. & Eng. Ann. Cas., 657, it was held that any advice given to clients or action taken for them, in matters connected with the law is practicing law. In that case the Court said:

"It is too obvious for discussion that the practice of law is not limited to the conduct of cases in Courts. Accord-

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ing to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and Courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all actions taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law. The following is the concise definition given by the Supreme Court of the United States: 'Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients may be regarded as attorneys at law within the meaning of that designation as employed in this country.' "

Under these definitions there can be no doubt that the giving of legal advice "regarding commercial matters" is engaging in the practice of law. This being true, we are of the opinion that the contract solicited and entered into by the plaintiff in error with the defendant in error, Dr. Gray, is illegal and non-enforceable, because against public policy.

The eighth item of said contract obligated the plaintiff in error to give to the defendant in error legal advice regarding all commercial matters, which was a portion of the service for which the \$10.00 were to be paid. The fact that plaintiff in error employs a licensed attorney to perform such service for it cannot make the contract legal, for the reason, that if it cannot practice law directly, it cannot do so indirectly by employing a licensed attorney to carry on the business of practicing law for it.

It results that we find no error in the judgment of the Court below, and it is affirmed with costs.

Anderson v. Featherly.

WALTER H. ANDERSON v. W. M. FEATHERLY.

Writ of certiorari denied by Supreme Court, 1915.

1. **LIBEL. Attorneys. Imputing incapacity.**

An article imputing incapacity or ignorance to a practicing attorney is actionable *per se*.

2. **SAME.**

An article is none the less libelous as imputing incapacity to an attorney notwithstanding words of praise or commendation if it be susceptible to the meaning in the worser sense.

3. **SAME. Article of dubious meaning.**

If an item in a newspaper be susceptible to two constructions, one of which would be libelous, it is for the jury to determine the intention of the publisher and the sense in which it was received by the readers.

4. **SAME. Whole to be submitted.**

The publisher as well as the plaintiff has a right to a submission of the whole of the article to the Court or jury pending the question of its meaning.

5. **SAME. Comment upon the qualifications of a candidate.**

Notwithstanding the right of the electorate to examine and comment upon the fitness of a candidate for public office, no one is excused from perpetrating in this guise a falsehood.

6. **SAME. Pleading. Demurrer.**

A publisher who relies upon demurrer to a declaration in libel cannot excuse himself upon the ground that plaintiff was candidate unless the article or the declaration reveals his candidacy.

FROM ROANE COUNTY.

Appeal in error from the Circuit Court of Roane County. SAM C. BROWN, Judge.

Anderson v. Featherly.

WRIGHT & JONES, CASSELL & HARRIS and WALTER H. ANDERSON for Plaintiff in Error.

H. M. CARR for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

WE shall call the parties plaintiff and defendant, just as they appeared in the lower Court. This is a suit by plaintiff to recover damages of the defendant for publishing in his newspaper an alleged libelous article imputing ignorance, incapacity and unfitness for the practice of the profession of the law. There are two counts in the declaration. The learned Circuit Judge sustained a demurrer to the two counts and dismissed the suit. Plaintiff excepted and perfected his appeal, and is here by appropriate assignment insisting that the Court was in error in sustaining the demurrer. We pause at this point to state that the Court was eminently correct in sustaining the demurrer, insofar as it challenged the second count.

It was charged in the first count in substance that the plaintiff had been regularly examined, licensed and admitted to the practice of law in Tennessee, and was at the time of the publication of the article in question actively engaged in the pursuit of his profession as his only vocation; that the defendant was the owner and publisher of a newspaper in the town of Harriman and that this newspaper had a wide circulation; and that the defendant, the said publisher, intending to injure and defame plaintiff and damage him in his profession, did publish in said newspaper of and concerning plaintiff the article which is herein below copied:

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QUESTION OF CITY JUDGE.

"We publish in this issue a letter from Representative W. H. Anderson, complaining because the *News* of last week saw fit to allege that his action in introducing a bill in the Legislature to abolish the office of City Recorder of Harriman and in its place constitute the office of City Judge, was done for the purpose of Mr. Anderson getting even with Recorder Browder, by legislating him out of office because Browder saw fit last fall to become a candidate for Representative against Anderson or for some other reason. Mr. Browder stated to the *Record* last week that Mr. Anderson's purpose in changing the office was to legislate him out of the office of Recorder. Mr. Anderson is eccentric and might, on the spur of the moment, do almost any kind of a freak trick, but if this measure was introduced for the purpose claimed by Mr. Anderson's own paper of the *News*, of getting even on Browder, Mr. Anderson will think better of the matter and recall the measure. He is not the kind of fellow to let a little bad feeling settle down for a long time. Mr. Anderson states that he does not know at this time who the editor of the *News* is, as he has not been informed who took his place in that position when he resigned a month ago. If Mr. Anderson will write to or make inquiry of S. K. Emory, he may be able to learn who is drawing the salary of this work. Mr. Anderson states that his measure calls for a lawyer to fill the place of City Judge. He goes on to state that the holding of a diploma as a lawyer is necessary for a man to be elected to the office. Not all men who hold such documents are lawyers, while there are men among them who never saw the inside of a law book who are better qualified to perform the duties of the office of City Judge of Harriman than a good many who hold the sheep skins. The holding of

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the sheep skin by a man supposed to be qualified for the Blackstone performance does not always of prime necessity make such a man versed in the mysteries of law. If there is any doubt by Mr. Anderson on this point, let him turn towards his mirror. We have no reason to question the merits or demerits of the bill which Mr. Anderson has introduced in the Legislature, because we know nothing about what it provides for. Mr. Anderson in his letter attempts to tell what its purposes are, but fell down and for some reason did not reach what he started to tell. We have as yet to learn of any demand for a change in the office. If there is any, then the provisions of the measure should be understood by the people of Harriman. Before the press *News* item of the introduction of the measure by Mr. Anderson, the writer had never heard of any contemplated change in the office of Recorder. Neither has he been able to learn of any one who had any previous knowledge of the proposed change. It is well to go slow and not attempt to lumber up the charter of Harriman with amendments without the people of Harriman being first aware of the provisions of such amendments. Mr. Anderson was elected solely by the vote of the people of Harriman. He would have been defeated had Harriman not given him an exceedingly unnatural large majority. He should at least consult his constituents. He should not let it be said with any degree of assurance that such a statement would be believed or was based upon any foundation of fact. That his action was for the purpose of gratifying some ulterior motive on his part, in which the people of Harriman are not in the least interested."

It will be noted that the plaintiff did not aver any special damages. It will also be observed that the publisher of the article did not impute any crime, and also that he stated

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very few facts, and that he indulged in a latitude of criticism and expression of opinion. The article is peculiar in that it contains much that is legitimate and permissible and some matter that is commendatory. But men have been damned by too much as well as by faint praise. That which concerns us is to ascertain whether the item when taken as a whole contains language which is libelous *per se*. Nor are we at the present greatly concerned with the exact meaning of the words. A declaration is good upon demurrer if the article upon which it is founded is reasonably susceptible to two or more constructions, one of which is libelous. *Hayes v. Hayes*, 1 Hump., 402. And in such case it is for the jury to ascertain the intention of the publisher and the meaning attributed by the readers.

The position of able counsel for defendant is that this article as a whole does not contain anything libelous, or that if it does, the matter is privileged upon the theory that it is fair comment upon a public official and legitimate criticism of a candidate.

We remark that all parts of the article which have reference to Mr. Anderson's legislative career and that evoked by a letter addressed to the editor might be covered by the above contention. But we are nowhere informed that Mr. Anderson was a candidate for City Judge. Hence, the attempt to excuse the item upon the ground that a candidate expose himself must be treated as without basis, for the reason that we cannot accept the mere oral statement that he was a candidate. But even if it be accepted for the purposes of the case that Mr. Anderson was an aspirant, there is no justification for the publication of an untrue statement nor of the imputation that he was lacking in the qualifications of the profession which he may be following. *Banner Co. v. The State*, 16 Lea, 176.

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Able counsel earnestly contends that this article does not impute ignorance or unfitness to Mr. Anderson. It is urged that it merely charges him with lack of knowledge of the mysteries and fundamentals of the science; and it is said that many successful members of the profession are not thus versed. The Circuit Judge was of this view. We are constrained to look at this item in a different way. It is true that many of the abstruse parts of the law remain inaccessible to numbers of the profession, including members of the judiciary; and it might be said that a random remark could be made to the effect that so and so was ignorant of some fundamentals without slandering the object of the observation. But there can hardly be a mistake as to the interpretation which the layman would put upon the terms which import that a man although possessing a license, is not a lawyer and not versed in the rules of law and not equipped to practice the Blackstonian profession. Nor is there much room for misapprehension that the possession of a license to practice law is no evidence of the licensee as the qualifications of a lawyer.

The uniform rule is that an article imputing to a lawyer lack of knowledge or capacity to follow his profession is actionable *per se*, and that it is unnecessary to aver special damages: 4 Ba. Br., 451; *Dauncy v. Holloway*, 3 Br. Rul. Cases, 54; 25 Cyc., 333; *Sanderson v. Caldwell*, 6 Am. Dec., 105. This is peculiarly true of written slander as contradistinguished from oral slander. The framers of the common law wisely made this distinction, and we should not disregard it. A casual remark that a lawyer is ignorant may soon pass away. Indeed, this is often said of fairly good lawyers, and is forgotten ere it is spoken. But when it is embalmed in print and sent over the land and read by people who are disposed to accept anything in print as lit-

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erally true, the injury inflicted is deep-seated. And it is for this reason that the common law requires a more liberal interpretation of the written than of the spoken word, and justifies more readily a resort to the tribunals for vindication.

In this day the possession of a license to practice law raises the presumption that the holder has that degree of knowledge required by the State. We have commissioners representing our commonwealth who prescribe those qualifications and stand at the door as it were and repel those who are not of the prescribed equipment. And hence the one who is admitted has the endorsement of the State virtually that he is entitled to the confidence of the public. It is true that this may be baseless; but the presumption is otherwise, and any article imputing lack of qualification should be treated as just cause for the institution of a suit for vindication.

We are not concerned with the truthfulness of the assertions in the article. Defendant has the right to a trial in which this issue is made. We are now determining simply that the item in question is susceptible to a libelous interpretation and that Mr. Featherly should respond.

We observed at the outset that of this article certain portions can well be treated as fair comment and legitimate criticism. But it must not be understood as deciding that any particular portion can be eliminated. Both plaintiff and defendant have the right to have the whole of the publication considered when determining whether it is libelous and injurious.

The judgment is reversed and the cause remanded for issue and further proceedings. Mr. Featherly will pay the costs.

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W. H. CARROLL v. FIDELITY TRUST CO.

Writ of certiorari denied by Supreme Court, 1914.

1. **CIRCUIT COURT PRACTICE.** *Special findings of fact. Evidence.*

The general rule is that the findings of fact of a circuit judge, reduced to writing upon request, are conclusive and are exclusively the basis of the judgment to be pronounced; and in such case the evidence need not be brought up nor considered. Exceptions to this rule are when there was request for additional findings, or when a finding is obscure, and when an inspection of the evidence might elucidate parts of the finding.

2. **SAME.** *Matters of defense must be mentioned in findings.*

In such case a defendant who relies upon certain facts to defeat recovery must see to it that the circuit judge embraces in his findings those matters of defense; and it is incumbent upon such defendant upon appeal to show that the circuit judge did or should have found those matters.

3. **BILLS AND NOTES.** *Notice of dishonor. How given.*

Notice of non-payment of a note may be given the endorers either orally or in writing, by mail or in person, and may be couched in any terms, provided the words used be sufficient to convey the facts.

4. **SAME.** *Liability of endorser upon promise to pay dishonored note.*

An endorser familiar with all the facts may bind himself by distinct promise after dishonor to pay the note.

5. **SAME.**

Where an endorser admits his promise to pay the note, but claims that his promise was made in ignorance of the facts and without knowledge of his non-liability, the burden is upon him to prove his lack of knowledge and non-liability.

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6. PRACTICE. *Defense of alteration.*

The defense of alteration of a note cannot be urged except upon plea of *non est factum*; and in case of special findings there must be a finding thereon by the circuit judge.

FROM SHELBY COUNTY.

Appealed in error from the Circuit Court of Shelby County. Division No. 4. H. W. LAUGHLIN, Judge.

HUBERT FISHER for Plaintiff in Error.

C. M. BRYAN and METCALF & METCALF for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS was a suit by defendant in error against Col. W. H. Carroll to recover on a note of \$300.00 executed by one W. S. W. Montgomery to it on May 30, 1909, on which Col. Carroll was either maker or endorser. The case was tried by the Circuit Judge without the intervention of a jury. He held Col. Carroll liable. Upon request seasonably made the Court filed written findings of fact and conclusions of law as required by statute in such cases. From this judgment Col. Carroll appealed and has assigned errors.

The findings of fact of the trial Court are as follows:

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No additional findings of fact were requested by either side. According to the practice in such cases we are confined to the above report of the trial Judge as to what were

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the facts of the case: *Insurance Co. v. Hinton*, 2 Cates, 113. But we are of the opinion that in a doubtful case or of an issue that is obscure when viewed from the findings of fact alone, it would not be amiss to look to the evidence for the purpose of ascertaining the meaning of the trial Judge. And we are bound to presume that the findings and conclusions of the Circuit Judge warranted the judgment pronounced by him, and it is our duty to sustain this judgment unless the record discloses *manifest error*. An appellant who assails the conclusion of the Court when his findings have been embodied in writing upon request should be able to show by other findings of fact or clear deductions therefrom that the trial Judge committed error. It appears to us further that an appellant who relies upon an exceptional defense to an ordinary right should be able to show clearly an exemption from liability: and this upon the findings filed.

It is said in the case at bar that the Circuit Judge should have relieved Col. Carroll of liability upon the ground that he had not been given due and legal notice of non-payment, and because at the time he made his promise to pay notwithstanding, he did not know that he had been relieved as endorser. The propositions of law advanced and the authorities cited are to the effect that an endorser to whom proper notice had not been given cannot be held liable, notwithstanding a promise to pay, unless it be shown that he was cognizant of all the facts and of his non-liability.

We feel constrained to hold this defense unavailing to plaintiff in error for the following reasons:

The Circuit Judge found in substance that Col. Carroll, who lived in Memphis, as did and does the holder of the paper, was orally notified on the day of the maturity of the note of the fact that it had been dishonored. This was

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and is sufficient to hold him liable and to sustain the judgment of the trial Judge, aside from the question of promise to pay. Notice of dishonor may be given either orally or in writing, in person or by mail, and may be communicated in any sort of phraseology sufficient to impart information that the obligation had not been paid; and it may be given at any time after presentment for payment and refusal to honor, provided, of course, it be given either on that day or the succeeding day: Sections 96, 102, 103, of Negotiable Instrument Law, Acts 1899. Again, we are persuaded that in view of the finding of the trial Court that Col. Carroll had distinctly promised to pay the obligation, it was incumbent upon him to show the Court, or rather to have the Court find, that at the time he made the promise he was ignorant of the facts and did not promise with full knowledge. It is true that if he made the promise in ignorance of the *facts* he could be excused from fulfilling his promise; and, while seemingly contradictory, it is nevertheless true that he is not bound by a promise unless he knows and realizes from all the facts that he is not in law bound. At the same time it strikes us that the burden is upon an endorser who seeks to avoid an unequivocal promise to pay to show or to have the Court find the facts or situation which would relieve him: *Bogart v. McClung*, 11 Heisk., 104, and cases therein cited; *Bank v. Dibrell*, 7 Pickle, 302. This is the interpretation which we give to and place upon those decisions.

It is next insisted that the judgment should have been in favor of Col. Carroll because the note showed an alteration in date. There are two answers to this, namely, the lack of a plea of *non est factum* and failure to request a finding of fact upon the part of the trial Judge.

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Notwithstanding the hardship resulting to Col. Carroll, we have been unable to discover any satisfactory legal reason for reversing the judgment against him. It is accordingly affirmed with costs.

MEMPHIS STREET RAILWAY v. J. A. BAILEY AND WIFE.

(Two cases.)

Writ of certiorari denied by Supreme Court, 1913.

1. PLEADING AND PRACTICE. *Election. Counts containing different versions of an injury.*

A plaintiff may use as many counts as he sees proper in setting forth an action of damages for negligence where they all relate to one occurrence and are merely different versions of the transaction; and he cannot be required to elect upon which count or counts he will rely.

2. OBJECTIONS TO EVIDENCE. *Expert question. Specific.*

An objection to a question propounded to an expert witness should specify the reason why the question should not be propounded. A general objection will not suffice.

3. INSTRUCTIONS TO JURY. *Ouring erroneous instruction by subsequent ones.*

An error committed by the trial judge in his main charge may be corrected by him by subsequent instructions specifically calling the attention of the jury thereto.

4. SAME. *A repetition of instruction.*

It is impossible for a Court to be strictly accurate in every sentence or paragraph of instructions given to juries in complicated cases. Hence, instructions must be construed to

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gether. It is not necessary to repeat in every proposition the exceptions thereto, nor to state in immediate connection with every proposition every matter of defense, provided the defensive matters are clearly set forth at other places.

5. PHYSICIANS' OPINIONS.

A physician may be asked whether certain injuries were capable of producing certain ailments, and whether certain ailments or injuries are permanent.

FROM SHELBY COUNTY.

Appealed in error from Circuit Court of Shelby County,
Division I. J. P. YOUNG, Judge.

ROAN WARING and S. P. WALKER for Plaintiff.

BELL, TERRY & BELL for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THESE actions, two in number, were instituted by the defendants in error in the Circuit Court of Shelby County, against the Memphis Street Railway Company to recover damages alleged to have been sustained by Mrs. Bailey by falling into an excavation made by the defendant company in one of the principal streets of Memphis, and which it is alleged had been left open, exposed and unguarded by it.

The first suit is brought by Mrs. Bailey jointly with her husband for her injuries. The second suit is brought by the husband to recover for the loss of services of his wife and medical expenses incurred by him in an effort to have her cured of her injuries. Both cases were heard

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together in the Court below before the Court and a jury, and there was a verdict and judgment in the wife's case for \$3,000, and a verdict and judgment in the husband's case for \$500. From these judgments the defendant company appealed to this Court, after its motions for a new trial had been made and overruled, and it has assigned errors.

Before stating and considering the assignments of error urged by the defendant company, we might say that these suits were tried at a former term of the Court below, and resulted in verdicts in favor of the plaintiffs in each case, which were set aside by the trial Court upon motion of the defendant.

The original declaration in the wife's case alleged that she was a passenger upon one of the defendant's east-bound cars in the city of Memphis, and when the same had arrived at her destination, Patton Avenue and McLemore Avenue, said car was stopped for her to alight. That in alighting from said car she stepped into a deep hole or excavation, which had been made by the defendant in repairing its south track at the point where the accident occurred, and was seriously injured. The declaration alleged that the negligence of the defendant consisted in that it stopped the car at an unsafe place for the plaintiff to alight therefrom; and that the defendant provided no barriers or lights to warn the plaintiff of the danger and presence of said excavation.

Before the second trial was had, to wit, on October 20, 1911, by leave of the Court, plaintiffs filed an amended declaration containing two counts. The allegations contained in the first count were, in substance, the same as the allegations contained in the original declaration. The second count alleged that Mrs. Bailey had just disembarked from the car at the corner of Patton and McLemore

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Avenues, where it had been stopped by the defendant for the purpose of allowing her to alight, and while she was walking from the car to the sidewalk, it being in the night time, she fell into an unguarded and unlighted excavation in the street, which had been made and allowed to so remain by the defendant company.

The second trial was had upon this amended declaration. There was proof offered by the plaintiffs tending to show that Mrs. Bailey, while in the act of alighting from the car at the intersection of Patton and McLemore Avenues, on July 27, 1910, at about the hour of 10 o'clock p.m., stepped into an open excavation which had been made by the defendant company and left unguarded and without signal lights, or other precautionary measures having been taken by the defendant to warn passengers alighting from its cars of its presence and the danger attending it, causing her to fall and sustain serious injuries. There was no proof offered by the plaintiffs tending to sustain the allegations contained in the second count of the amended declaration to the effect that she fell into the excavation after she had left the car and while walking from the car to the sidewalk.

At the close of the plaintiffs' proof the defendant moved the Court to require the plaintiffs to elect upon which count of the declaration they would proceed, assigning as grounds for the motion that the two counts set forth entirely different theories as to how the accident occurred, and the measure of duty resting upon the defendant toward the plaintiff, Mrs. Bailey, was entirely different under the two counts of the declaration. That in the first count, if the car stopped over the excavation, she had not ceased to be a passenger, and the defendant would be liable to her as a passenger for not stopping the car at a safe place. If it happened as alleged in the second count, the

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relation of passenger and carrier had ceased, and the defendant only owed her the same duty as it did to any other person upon the street.

The Court declined to require the plaintiffs to elect, and the motion was overruled and the defendant excepted. Thereupon, the defendant offered proof tending to show that Mrs. Bailey did not step into the excavation while alighting from the car, but stepped into it while going from the car across the street to the pavement.

At the close of all the evidence the defendant renewed its motion to require the plaintiffs to elect upon which count of the declaration they would rest their case, and the motion was again overruled by the Court. The action of the Court in overruling the motion of the defendant to require the plaintiffs to make an election as above indicated is made the basis of the first assignment of error.

The gist of the defendant's contention under this assignment of error is, that the declaration alleged two separate and distinct causes of action which could not be joined in one suit, or in one declaration. We cannot assent to this contention of counsel for the defendant. We do not think the declaration states two separate and distinct causes of action. It only states one cause of action, but that cause of action is differently stated in the two counts of the declaration. In other words, each count of the declaration states different theories as to how the plaintiff, Mrs. Bailey, was injured. This, we think, was permissible under our liberal rules of pleading.

Shannon's Code, Section 4617, provides: "The declaration shall state the plaintiff's cause of action. It may contain separate statements or counts. But where several distinct causes of action against the same party are joined, the Court may direct separate trials of the issues."

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In *Bible v. Palmer*, 95 Tenn., 393, the Court said: "It is allowable to join two or more distinct causes of action in as many different counts of the same declaration, when as in this case, the different counts are of the same quality or character, and not repugnant or antagonistic to each other."

The plaintiff's declaration in that case contained two counts, one for malicious prosecution, and the other for slander. The defendant demurred for misjoinder, and said that the declaration embraced two distinct causes of action, which could not be properly joined in the same suit. The demurrer was sustained, with leave to the plaintiff to elect which of the two causes he would prosecute. Upon his refusal to make an election, the suit was dismissed, and the plaintiff appealed in error. The Supreme Court reversed the action of the lower Court in sustaining the demurrer, holding that there was no misjoinder.

In view of the holding in the *Bible* case, *supra*, it certainly cannot be said that the plaintiff, Mrs. Bailey, in stating her cause of action in the instant case, cannot set out in separate counts of the declaration any theory as to how the accident occurred, whether advanced by her or the defendant. The first assignment of error will be overruled.

The second assignment of error complains of the action of the trial Judge in permitting the witness, Dr. Turner, offered by the plaintiffs, and who testified as an expert, to state over the defendant's objection, in answer to a hypothetical question, that certain physical ailments of Mrs. Bailey were the probable result of the fall she received by stepping into the excavation. In other words, the witness was permitted to say that the fall was likely to produce such ailments. This is what the question and answer mean, and no more.

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It is insisted that the witness was permitted to give as his opinion that the physical ailments of Mrs. Bailey were due to the fall that she received while alighting from the car, or just after she had disembarked, and, therefore, falls within the holding of this Court in *Memphis Street Railway Company v. J. H. Hicks et al*, reported in I. C. C. A. (Tenn.), 513. We cannot assent to this contention of counsel. While we fully adhere to the holding announced in the Hicks case, we do not think the instant case presents the question that was presented in that case. In that case the medical experts testifying on behalf of the plaintiffs were permitted to give as their opinion that certain physical ailments with which Mrs. Hicks was suffering were due to certain injuries she had received in a street car accident about which they knew nothing. In the instant case the medical expert only said that Mrs. Bailey's condition was a probable result of the fall. In other words, the fall was likely to produce such a result, or that such a result from the fall was probable. An examination of the opinion in the Hicks case will disclose that it was expressly held in that case that it would have been entirely proper for the medical experts to have stated that in their opinion the injuries sustained by Mrs. Hicks in the street car accident were likely to have produced the physical ailments with which she was suffering. In other words, that it was probable that such injuries would produce such conditions.

In that case, however, the experts were permitted to give it as their unqualified opinion that the physical condition of Mrs. Hicks was due to the injuries she had received in a certain street car accident, and it was for that error the case was reversed and remanded.

The third and fourth assignments of error complain of the action of the Court in admitting, over the objection of

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the defendant, the following hypothetical questions and answers thereto, propounded to the medical experts testifying on behalf of the plaintiffs. The first of these questions was propounded by Dr. Turner, and is as follows:

"Q. Doctor, assuming that prior to the 27th of July, 1910, Mrs. Bailey was a woman in perfect health with the exception that she had suffered a year and a half or two and a half years before with lack of appetite and a bilious attack, and that she had never had any illness for the last six years except an attack of malaria, and that on that day she is getting off of a street car and stepped into an excavation some eighteen inches or two feet deeper than the surface of the ground, and that she was injured in her back, in her arm, her shoulder, neck and generally made sore throughout her body and in the abdomen. Assume that on that night and the next morning she was extremely nervous from that fall, and that before that time her menstrual periods were regular, lasting from three to four days, and was about like the normal woman; that since that time her menstrual periods have become irregular; that they last sometimes for two or three weeks, and at the present time they have lasted for a month; that before that time she did not suffer from nervousness and with sleeplessness, but since that time she has grown nervous, suffers from nervousness and sleeplessness, and that she has lost about twenty pounds in weight, beginning and gradually declining for several months after the accident. Please tell the jury whether or not, in your opinion as a physician, her condition is permanent."

In answer to this question the physician stated: "Assuming the conditions stated in the hypothetical question, I would consider that the condition of the patient would remain unchanged."

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Now, the objection to this question and answer was general. The objection of the defendant was as follows: "Defendant objects to that, of course."

The second question was propounded to Dr. Baker, and is as follows:

"Q. Doctor, assuming that Mrs. Bailey was in the condition of health which you knew her to be in before this accident, and that her condition is what you know—what you yourself have seen ever since the accident up to this time, considering the fact that she has been nervous since, as you have noticed, and considering the length of time which has elapsed between the date of the accident and this trial, please tell the jury whether or not, in your opinion, that condition is or is not permanent."

The answer of the physician was: "Well, I am of the opinion at present that the woman will never get over the nervousness that is now attending her."

The defendant's objection to this question and answer was likewise general, and in language as follows: "The defendant objects to that as incompetent."

These general objections were insufficient, because they did not specify the grounds upon which they were based. They should have been special in order to give the defendant the right to base assignments of error on them in this Court. *Garner v. State*, 5 Lea, 213; *Rogers v. Hollingsworth*, 95 Tenn., 359; *Bank v. Bank*, 108 Tenn., 374; *Burton v. Farmer's Association*, 104 Tenn., 414; *Miller v. State*, 12 Lea, 223.

The fifth assignment of error complains of the action of the Court in instructing the jury as follows:

"I say to you that when a party becomes a passenger upon a street railway, the street railway company is bound to use and exercise the highest degree of skill and care

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to protect that passenger before he has disembarked, and while he is in the act of disembarking, the servants of the company are bound to see and know that the passenger is safely disembarked before proceeding with the journey of the car. After a proper signal has been made by a passenger for a car to stop, or if the passenger is in the act of alighting and the servants of the company know that the passenger is in the act of alighting, and the car has been stopped for that purpose, the servants of the company have no right to move the car forward during the disembarkation of the passenger, but it is their duty to keep the car still until the passenger has safely disembarked before proceeding on the journey of the car."

It is insisted by the defendant that this instruction was not applicable to the facts of the case, and was, therefore, error.

It doubtless would have been error if the Court had not withdrawn it from the jury immediately after it was given. This was done by the Court in the following language:

"Gentlemen of the jury, counsel for the plaintiff calls my attention to a statement in the charge to the effect that it is the duty of the street car company, when a passenger is in the act of alighting, to keep the car still until the passenger has safely alighted, and it is their duty to see and know that the passenger has safely alighted before they proceed with the journey of the car, and that they had no right to proceed with the car until the passenger has safely disembarked. That is a statement of law that does not apply to this case at all. The theory of the plaintiff here is, in her first count, that she stepped from the car into an excavation. That is an allegation of the first part of the declaration. So all of these statements about the duty of the defendant company to see and know that

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a passenger has safely disembarked before proceeding with the journey of the car, have no application to this case. That was an inadvertence on my part. Now, let me repeat to you that the question of the starting of the car while the passenger was in the act of disembarking, or after the passenger had disembarked, does not enter into this case at all; I was merely stating a general principal of law which has no application to this case. You gentlemen will, of course, understand that it has no application here, and will not take that part of the charge into consideration. I so frequently charge juries here that sometimes things are said that do not apply in a given case, and that is one of the instances in which a part of the charge does not apply here. You will understand, I think, from the statement that I have made, that that part of the charge has no application to the suit here; you will pay no further attention to it. If any of you gentlemen do not understand me in my explanation of that matter, I wish you would speak out. Have I made myself clear as to that point—that you will not consider it at all?”

The record expressly shows that the jury fully understood that the instruction had been withdrawn from them by giving their assent upon being asked by the Court if they fully understood that the instruction had been withdrawn from them and they were not to consider the same.

We think, in view of this very clear and emphatic withdrawal of the instruction by the Court, that the error, if such it was, was cured, and no prejudice or injury resulted to the defendant on account of same.

The sixth assignment complains of the action of the trial Judge in giving in charge to the jury plaintiffs' special request, as follows: “You are instructed that it is the duty of the street railway company to stop its cars at a place that will afford a safe place at which its passengers

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may alight. So, in this case, if you believe that the defendant stopped its car at a place at which it was dangerous for the plaintiff to alight, and you further find that plaintiff was injured by reason of the defendant's negligence, then the plaintiff would be entitled to recover, and you should so find."

It is insisted by the defendant that this instruction was unsound, and should not have been given, because it left out of consideration any contributory negligence upon the part of the plaintiff, Mrs. Bailey, whether proximate or remote. It is a sufficient answer to this contention to say that the Court, in his general charge, did instruct the plaintiff fully upon the plaintiff's contributory negligence in the following language:

"On the other hand, gentlemen of the jury, if a plaintiff fails to show by a preponderance of the evidence that he was injured, or if he fails to show by a preponderance of the evidence that he was injured through the fault and negligence of the defendant company, or if it appears from the whole proof that he himself was guilty of some negligence which in any sense directly or proximately contributed to bring about the casualty, then in each of those events, you will find in favor of the defendant."

Again: "Now, gentlemen of the jury, in charging you here, for convenience, I will use the masculine form, speaking of plaintiff as 'him'. But I say to you, gentlemen of the jury, that the only person whose conduct can be taken into consideration, so far as the plaintiff is concerned, at the time this casualty occurred, is that of the wife herself. The question with regard to contributory negligence there is that of the wife and not of the husband. There is no contention as to him in that respect at all. He is not the one who claims to have been injured, and the defendant is

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here claiming that it was the wife who was guilty of negligence—the contributory negligence.”

Again: “Now, gentlemen of the jury, what is the effect of contributory negligence on the part of the wife, if any be shown?”

“I say to you that if the plaintiff is guilty of negligence, which in any sense directly or proximately contributes to bring about an injury upon himself, that he cannot recover at all, no matter whether the defendant is guilty of negligence or not, but if the defendant is guilty of negligence which does not directly and proximately contribute to bring about a casualty, and the plaintiff is also guilty of negligence, but that negligence of the plaintiff does not directly or proximately contribute to it, then that remote contributory negligence of the plaintiff will not prevent him from recovering, but will only go to mitigation of damages; so that you will find in favor of the plaintiff, but will reduce and mitigate the damages on account of the remote contributory negligence.”

Without further quoting from the charge upon this question, we will state that the foregoing instruction is repeated in a subsequent portion of the Court’s charge, and we are wholly unable to see how the jury could have been misled or gone astray upon the question of the plaintiff’s contributory negligence. The charge was certainly full and ample upon that question, and was as favorable as the defendant could desire it to be.

The seventh assignment complains of the action of the trial Judge in declining to give in charge to the jury the defendant’s special request, as follows:

“You are instructed that the evidence of witnesses, one or more, to the effect that they were at the scene of the accident prior to the time of the accident, and that they

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did not see any lights or danger signals, is negative evidence, and entitled to less weight as compared to the testimony of equally credible witnesses, if such there were, who testified to being present at the time of the accident, and who testify affirmatively that there were red lights there."

There was no error committed by the trial Judge in declining to give this special request, for the following reasons:

First, the Court did instruct the jury upon the question of positive and negative evidence in the following language: "Upon the question of positive and negative evidence, the Court charges that where certain witnesses testify positively that they saw a certain thing at a certain place upon a certain time, that would be positive evidence; but where other witnesses testify that they did not see a certain thing at a certain place at a certain time, that would be negative evidence, and all else being equal and the witnesses being of equal fairness and having an equal opportunity to see and their stories being equally reasonable, the testimony of the witnesses swearing that they did see the thing, being positive evidence, would be entitled to more weight than the testimony of the negative witnesses."

Second, all of the witnesses offered by the plaintiffs, and who testified upon the question of whether there were lights or danger signals at the place of the accident, stated positively that there were no such lights or danger signals there. An examination of the record will disclose that such were the statements of the witnesses offered by the plaintiffs testifying upon this subject.

The eighth assignment of error complains of the action of the trial Judge in declining to give in charge to the jury its special request, as follows:

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"I have charged you that in passing upon the question of whether or not the plaintiff was guilty of negligence, I told you to consider whether she acted as a reasonably prudent person. I supplement this by saying that in passing upon whether the plaintiff was negligent in falling into the excavation, you are to ask yourself whether or not a reasonably prudent person, in passing along there, would have fallen into the excavation under similar circumstances. If a reasonably prudent person, under the same circumstances and conditions, would have seen the excavation and not fallen into it, then the plaintiff would not have been in the exercise of reasonable care, and would be negligent, and if this negligence contributed in the slightest degree to the accident, she cannot recover."

There was no error in the action of the Court in declining this request, because it was substantially covered in the Court's general charge, as follows:

"This plaintiff, Alice M. Bailey, ask yourselves this question: Was she acting as a reasonably prudent person would have done under similar circumstances and conditions? If she acted as a reasonably prudent person under similar circumstances and conditions, would have done, then she would not be guilty of negligence. On the other hand, if she was acting as a reasonably prudent person would not have done under similar circumstances and conditions, then she would be guilty of negligence."

The ninth and last assignment of error is to the effect that the verdict is so excessive as to evince passion, prejudice and caprice upon the part of the jury.

We are of opinion that the verdict is not excessive as urged. There is evidence tending to show that the injuries of Mrs. Bailey were serious, and there is a strong probability that they are permanent. She was confined to her

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bed for some two or three weeks. She was in a delicate condition at the time of the injuries, and a miscarriage was the result. Since that time, according to the testimony of her physician and other witnesses, she has been extremely nervous, and has lost about twenty pounds in flesh. The evidence tends to show that her physical condition produced by these injuries is such that she has been unable to perform any kind of house work or labor since the accident, which occurred on July 27, 1910.

While we think the verdict of \$3,000 is, perhaps, a full recovery, we are entirely satisfied that there was no passion, prejudice or caprice upon the part of the jury in rendering such a verdict. If the nervous condition of the plaintiff, whom the proof tends to show was a well, strong and robust woman before her injuries, should prove to be permanent, as is probable from the evidence, then the verdict is a very moderate one.

It results that we find that none of the assignments of error are well taken, and are overruled, and the judgments will be affirmed with costs.

Aste Brothers v. Trust Co.

ASTE BROTHERS v. GERMANIA BANK & TRUST CO. ET AL.

Affirmed by Supreme Court, 1914.

1. LEASE CONTRACT. *Illegal use of premises. Right to collect rent.*

The owner of a building who leases it and its fixtures to another for the well-understood purpose of enabling the latter to carry on an illegal liquor business cannot enforce payment of the rent notes.

2. ILLEGAL CONTRACTS. *Locus poenitentiae*

A party who has leased a building expressly for the purpose of engaging in the unlawful sale of liquor therein and who has executed a series of notes for rent during the existence of the lease may recant and may maintain a bill to cancel the lease and the notes.

FROM SHELBY COUNTY.

Appealed from Part II of the Chancery Court of Shelby County. FRANCES FENTRESS, Chancellor.

GATES & MARTIN for Complainants.

HIRSH & GOODMAN for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

BILL filed by Complainants to have delivered up for cancellation a certain lease upon a building in Memphis and notes executed as rentals and a mortgage executed to secure these rental notes. The theory was that the building was

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rented for illegal purposes, to wit, that of operating a saloon contrary to law, and that the lessees had the right to abandon the lease and demand surrender of their obligations. The Chancellor granted the relief sought. Defendant bank excepted and prayed and perfected its appeal and is here assigning errors.

The decree of the Chancellor, which is directed to be copied upon the minutes of this Court, is in all things affirmed. Reference to it is here made for the purpose of ascertaining the facts. We concur with the Chancellor in his conclusions of fact and law, especially that part of it, not expressly stated, to the effect that the building in question was leased for one purpose only, namely, that of running a saloon in violation of law; that in fact the lessees took the building upon condition only that it might be run as a saloon in violation of the laws and policy of this State, and that this intention and this purpose were known to and assented to by the representatives of defendant.

In so doing all parties, especially the lessors, violated the law themselves, and possibly could have been subjected to indictment. Acts 1897, chapter 161. At all events they knowingly *participated* in an arrangement violative of a public policy of this State discountenancing the sale of liquor that is universally known. This would deprive them of the right to collect the rent. *Heart v. Brewing Co.*, 13 Cates, 69, and cases referred to: *State v. Potter*, 30 Ia., 587. We also think that the cases and notes found at page 662 of 19 L. R. A. (N. S.), and 1104 of 39 L. R. A. (N. S.), lend more support to this proposition than they do to the reverse.

We do not think that the many authorities presented by learned counsel upon the other side, beginning with *Mc-*

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Gavock v. Puryear, 6 Cold., 34, are entirely controlling. In those cases the vendors and lenders were not in any sense participators in the uses to which the property was to be applied. Here the lessors included in their lease certain property that was adapted to saloon purposes only and actively contracted and co-operated with the lessees in establishing and maintaining an illegal business. But even if we should be of the opinion that the pronouncements of the Supreme Court of Tennessee in the cases mentioned are apposite, we would be inclined to the opinion that our accentuated public policy upon the subject of illegal sale of liquors would now require a somewhat different holding.

It seems to be virtually conceded that if the lessors could not collect these notes because of the illegality of their consideration, their cancellation might be demanded by the makers. This is an instance where the doctrine of *pari delicto* does not repel either party. It is here that public policy intervenes and allows one of the parties to recant and put a stop to the illegal operation. Nothing need be said upon this subject further than reference to the cases of *Porter v. Jones*, 6 Cold., 313, and *McCutchen v. Cap-sule Co.*, 71 Fed., 787.

The decree of the Chancellor is affirmed. Defendants are taxed with all the costs.

Swift & Co. v. Rogers.

SWIFT & COMPANY V. CARL ROGERS AND WIFE.

BUYER AND SELLER. *Sale of tainted meat by packer to retail butcher. Right of action for damages.*

A retail butcher who buys for re-sale to his customers tainted meat from a packer under a warranty of soundness and also under circumstances justifying the imputation of negligence upon the part of the packer, may maintain an action for damages against the packer for loss of business and business standing where he has vended the spoilt meat to his customers, who not only returned the meat but discontinued their patronage and induced others to cease dealing with the butcher. In such case there should be an allowance of an amount sufficient to indemnify the butcher for the loss of his trade.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
VON A. HUFFAKER, Judge.

LUCKY & ANDREWS for Plaintiff in Error.

JOHNSON & COX for Defendants in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

ROGERS and wife sued Swift & Company for damages resulting to them from the alleged wrongs of the company in selling to them as butchers some unwholesome meat to be revended. The case was tried by the Circuit Judge without the intervention of a jury. He pronounced judg-

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ment in favor of plaintiffs below for \$499.00. Swift & Company have appealed and assigned errors.

There is some question as to the right of appellants to a review of the action of the lower Court because of their failure to set out in proper time their several grounds for seeking a new trial. It appears by the record that the motion for new trial which was acted upon and overruled by the Court was general, and that the specific motion found in the record was made after motion overruled and appeal taken to this Court. The rule now is to require specific assignments in the lower Court as a condition precedent to a review in the Appellate Courts, regardless of the question as to whether the lower Courts have any rule upon the subject. But this practice has not until lately been observed; nor is it generally known that this Court adopted the Supreme Court rule upon the subject. Hence, the reason why learned counsel for the company omitted his specifications. It is for this reason that we have concluded to consider this case upon its merits, at least as to the main question.

Plaintiffs planted their right of recovery upon fraud and deceit, an express warranty and negligence of the vendor. We find upon an examination of the record that they submitted material testimony tending to show that the agents of appellants were guilty of negligence and that they also failed to disclose conditions which undoubtedly affected the quality of the beef which was sold to the Rogers, and there is also evidence to support an express warranty of soundness. Every presumption must be in favor of the judgment below, and the best view must be taken of the testimony. We are persuaded that there was evidence which tended to show each one of the phases of liability set forth in the warrant. Plaintiffs were butchers and had

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a choice and profitable trade. There is evidence to the effect that they lost their trade and that they suffered in reputation and were otherwise damaged. This gave them a right of action of damages.

Learned counsel for appellants insist that defendants in error had no right of action for damages, but that this right is in their customers who suffered by using the impure meat. That is not the rule which meets our approval. We see no reason for denying a retailer a right of action for loss of reputation and trade occasioned by the wrongs of a wholesaler. The latter knows that goods furnished are bought to be resold; and he is also aware of the possibilities of a sale by his retailer of tainted food. The inevitable consequence is the loss of trade and reputation. And for this loss the law should and in our judgment does provide indemnity. See as to the general proposition of the right of a vendee to recover more than purchase price the cause of *Dushane v. Benedict*, 120 U. S., 630, 30 Law Ed., 810; and with respect to the right of a retailer to recover for loss of trade see *Mazetti v. Armour*, 75 Washington, 622, 48 L. R. A. (N. S.), 213; *Neiman v. Oil Co.*, 140 A. S. R., 458.

Our serious concern in this case has been with respect to the amount of damages. We have been impressed that the amount allowed was unusually large. And yet we cannot definitely pronounce it excessive to such an extent as to be manifestly wrong. Judgment affirmed.

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J. C. JACOBS BANKING CO. v. SECURITY BANKING CO.

Affirmed by Supreme Court, 1915.

1. **CHANCERY JURISDICTION.** *Enjoining void judgment and garnishment proceedings.*

A Court of equity has jurisdiction to enjoin the enforcement of a void judgment and to quash and nullify all garnishment proceedings thereunder.

2. **VOID JUDGMENTS.** *Judgment without service of process or attachment.*

A judgment taken without notice or attachment is absolutely void.

3. **FOREIGN CORPORATION.** *Service on an official of a company temporarily in the State.*

In a suit against a foreign corporation personal service upon an official of the company who is temporarily in this State is not service upon the company.

4. **SAME.** *Foreign partnership. Service upon one partner in a suit against partnership.*

Service upon one member of a firm in a suit against the firm will not authorize judgment against the firm.

5. **JUSTICE'S WARRANT.** *Attachment proceedings. Form of warrant. Leading process.*

Where in an attachment suit the justice issues a personal summons which is regularly served, the summons becomes the leading process in the case; and in such case the warrant must be good in form and substance.

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6. *SAME. Form of warrant.*

A justice's warrant in the following form and substance is bad:
"Summon J. B. to appear, etc., to answer the complaint of
——— in a civil suit for \$300." The nature of the case and
the name of the plaintiff must appear.

FROM HAMILTON COUNTY.

Appeal from the Chancery Court of Hamilton County.
T. M. McCONNELL, Chancellor.

W. B. MILLER for Appellant.

WILKERSON & WILKERSON for Appellees.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS bill was filed by complainant, charging that a certain judgment rendered by a Justice of the Peace in Hamilton County, Tennessee, against it, and also a certain other judgment rendered by the same Justice, in Hamilton County, on a garnishment notice against the First National Bank of Chattanooga, Tennessee, are void for the reasons stated in the bill and which will more fully appear herein, and seeking to have said judgments declared void and praying for an injunction to enjoin and restrain the defendant, the Security Bank & Trust Co., from enforcing the collection of the amount due on said judgments.

The case was heard by the Chancellor, and complainant's bill dismissed. From this decree the J. C. Jacobs Banking Company has prosecuted an appeal to this Court, and has assigned errors.

There is some uncertainty and doubt from this record whether the complainant is an Alabama corporation, or

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a partnership engaged in the banking business. There is proof in the record that complainant is doing a banking business in the town stated in Alabama, and that it has a president, a cashier and an assistant cashier. This is some evidence indicating that complainant is a corporation, and in the absence of any proof that it is not, or that it is a partnership. Its name indicates that it is an incorporated banking institution; and this fact, together with the other facts, that it has a president, cashier and assistant cashier, coupled with the additional fact that, as a rule, banking institutions are incorporated, we think is sufficient to warrant us in the assumption that complainant is an incorporated company, doing a banking business at the place stated in Alabama.

The transaction out of which the alleged judgments in this case arose, is as follows: There was a manufacturing company near Scottsboro, Alabama, which had failed in business, and its assets placed in control of and under the jurisdiction and orders of the Bankrupt Court in that State. Three trustees had been appointed to take charge of and dispose of the assets of the bankrupt. These trustees had been ordered by the Bankrupt Court to pay out the funds arising from the sale of the assets, and among the debts ordered paid by the Bankrupt Court, was one of \$300.00 due to one J. W. Eastman. The funds of the bankrupt had been placed by these trustees to their credit in the complainant bank, and were held by it subject to the checks of the trustees in bankruptcy. After the trustees had been directed by the Bankrupt Court to pay the \$300.00 to Eastman, they drew a check in favor of him on complainant bank for \$300.00, and signed their names to it. The bill alleges that Mr. Eastman was indebted to the First State Bank of Bridgeport, Alabama, which had made an assignment of its assets to an assignee named in the

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bill. It is then charged that the assignee of the First State Bank had begun attachment proceedings against Eastman, and had garnisheed the complainant bank and had thereby impounded the \$300.00 that had been ordered paid to him. The bill charges that these attachment and garnishment proceedings were instituted the next day, after the check was given to Mr. Eastman, and that complainant bank was, on the same day, notified of the garnishment and attachment proceedings, and ordered not to pay the fund to him. The proof indicates that there was some kind of attachment proceedings, and also that complainant bank was notified by one of the trustees in bankruptcy not to pay to Eastman, or to any one on his order, the \$300.00 covered by the check given him.

The day following the delivery of the check to Mr. Eastman, he sold it and endorsed his name on the back of it, to the defendant, the Security Bank & Trust Co., in Chattanooga, Tennessee, and was paid by this bank the amount of the check less certain charges it made. The check was cleared through the Hamilton County National Bank in Chattanooga, and in due time reached complainant bank, but some days after, it is charged the fund had been garnisheed and complainant bank had been notified by one of the trustees in bankruptcy not to pay the check. When presented to complainant bank, the check was not paid, but returned to the Security Bank & Trust Company. This bank proves by its witnesses that, when the check was returned to it, it was endorsed upon the back, "Payment refused because the funds garnished or attached." It is evident that complainant bank did not know that this check had been given before it was notified by one of the trustees not to pay it, and in fact did not know that Mr. Eastman was entitled to any part of the bankrupt fund. It had never accepted the check, nor agreed to pay it, and

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made no promise to pay it. The check was simply drawn against the funds by the trustees in favor of Eastman, and by him sold and endorsed to the Security Bank & Trust Company, and by it in due course forwarded to complainant bank, where payment was refused for the reasons stated on the back of it.

At this point we will state that there is no competent proof of the institution of the attachment and garnishment proceedings in Alabama to attach the \$300.00 ordered paid to Mr. Eastman, except the proof made by the defendant, Security Bank & Trust Company, that the check itself had endorsed on it the statement that payment was refused because the fund had been garnished; and from this statement and proof we think we may infer that such proceeding had been instituted, and said fund garnisheed in the hands of complainant bank.

It appears from the proof that one of the trustees in bankruptcy, after signing the check and delivering it to Eastman, and probably the next day thereafter, but before it was presented for payment, had notified the bank not to pay it; and it is insisted by its learned counsel that this notice by one of the trustees was sufficient to justify it in refusing to pay the check when it was presented, even if the fund had not then been garnisheed. It is, however, insisted by learned counsel for the Security Bank & Trust Company that this trustee was acting, at the time he gave this notice, as the lawyer for the Receiver, or assignee of the First State Bank that instituted the attachment proceedings against Eastman, and was not acting as one of the trustees in giving such notice. It is further insisted that all of the trustees did not notify complainant bank not to pay the check when presented, and for these reasons it was not justified in refusing payment. We do not think it necessary that all three of the trustees, in person,

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should go to the bank and notify it not to pay the check, or that they should all three, in person, so notify the president of the bank. If one of them gave notice, that would be sufficient for all of them. Whether the trustee who did give the notice was acting for the First State Bank, or its assignee or Receiver, or was acting at the time he gave the notice as a trustee, we do not undertake to decide, because there is no proof that he was acting in the capacity of attorney, and the defendant's learned counsel insists there is no proof in the record of the institution of attachment proceedings to impound this fund in Alabama, and if there is no proof of this fact, then it would certainly follow that there was no proof that this trustee was acting as attorney for the plaintiff in such attachment proceedings. In view of the condition of this record, we see no escape from the conclusion that the trustee who gave the notice mentioned was acting as one of the trustees and gave it in behalf of and for all of his associates.

A few days after the refusal of complainant bank to pay the check, the defendant, the Security Bank & Trust Co., began an attachment suit in Chattanooga, Hamilton County, Tennessee, against the J. C. Jacobs Banking Co., to collect the \$300.00 covered by this check. This suit was begun before a Justice of the Peace for Hamilton County, on the 30th of January, 1912, and the affidavit made by one, J. E. Edington, in order to obtain an attachment in the case, is as follows:

“STATE OF TENNESSEE, HAMILTON COUNTY:

“Before me, Geo. W. Edwards, a Justice of the Peace in and for said county, personally appeared the undersigned, who (as agent) (as attorney) makes application for the writ of attachment, and on oath says:

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"That J. C. Jacobs Banking Co., is indebted to Security Bank & Trust Co., in the sum of \$300.00, by (note) (account); that said claim is just, due and unpaid, and that said debtor or defendants resides out of the State of Tennessee."

The above affidavit was signed and sworn to by Mr. Edington on the date stated. Thereupon a bond was made in the sum of \$600.00, signed by the Security Bank & Trust Co., and J. P. Edington, Security. An attachment was issued, but it is not necessary to copy it, and, on the same date, the Justice of the Peace issued a summons, which is in these words:

"JUSTICE'S SUMMONS.

"STATE OF TENNESSEE, HAMILTON COUNTY.

"To Any Lawful Officer in Said County:

"Summons J. C. Jacobs Banking Co. to appear before Geo. W. Edwards, J. P., at his office, Chattanooga, Tenn., to answer the complaint of _____ in a civil suit for \$300.00, commenced by original attachment returnable before said J. P.

"This 30th day of January, 1912.

"GEO. W. EDWARDS, J. P."

The affidavit, the bond, the attachment and the summons are all on one sheet of paper, and were printed forms and evidently such as are always used by the Justice in attachment cases. Evidently they were not prepared for this particular suit, but were such as the Justice used in all attachment cases. On the back of this paper, immediately on the back of the bond, are the following endorsements:

Banking Co. v. Banking Co.

"No. 2034.

ATTACHMENT AND SUMMONS.

"Security Bank & Trust Company, Plaintiff,

vs.

"J. C. Jacobs Banking Company, Defendant.

"Issued 30 day of Jan., 1912.

"GEO. W. EDWARDS, J. P.

"OFFICER'S RETURN ON SUMMONS:

"Executed on J. C. Jacobs, the highest officer of said Co. in the County.

"The foregoing summons came to hand same day issued. Executed as commanded, and set for trial before Geo. W. Edwards, J. P., 2 day of February 1911 at 2 o'clock P. M.

"S. M. TILFORD, D. S. Const."

The officer to whom the attachment was issued served a garnishment notice on Captain C. A. Lyerly, the highest officer of the First National Bank, and summoned it to appear before the Justice of the Peace on the 30th of January, 1912, to answer on oath what it owed the defendant and how much, and what property it had in its possession belonging to the defendant, the J. C. Jacobs Banking Co.

There were never any further steps taken in regard to this garnishment proceeding against the First National Bank. The record shows it was simply garnisheed by virtue of the attachment issued by the Justice of the Peace, after the officer had made search and found no property of the J. C. Jacobs Banking Company in Hamilton County. The garnishee, the First National Bank, never made any answer to the garnishment notice, nor was there any judgment rendered by the Justice of the Peace against it on such notice. There was no publication ordered or made by

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the Justice of the Peace after this garnishment notice was served on the First National Bank. In fact, the entire attachment and garnishment proceedings seem to have been abandoned after the notice was served upon the First National Bank, and no further steps were taken on such proceedings after the service of such notice. The suit seems to have proceeded against the J. C. Jacobs Banking Company upon the theory that it was in Court, by the service of the summons, which we have quoted, *supra*, and by virtue of the officer's return quoted above; that he had executed the summons, "on J. C. Jacobs, the highest officer of said company in the county."

On the 2d of February, 1912, the Justice of the Peace rendered a judgment in favor of the Security Bank & Trust Company against the J. C. Jacobs Banking Company, in the sum of \$300.00, and costs of suit. The only evidence we have that such judgment was rendered is an endorsement on the back of the affidavit made for the attachment. This judgment is a printed blank form undoubtedly printed on the back of the affidavit at the time this entire sheet of paper was printed, and was a form prepared and printed to be used in all cases where attachment proceedings were instituted and judgment rendered in such proceedings. The judgment, as it appears on the back of the affidavit, is as follows:

"Security B. & T. Co. v. J. C. Jacobs Banking Co.

"In this case the parties appeared, and, upon proof, I give judgment in favor of the Plaintiff and against the Defendant for \$300.00 and costs of suit, and an order of sale is awarded to sell ————— the property attached in this case for cash in hand. .

"This 2 day of Feb., 1912.

"GEO. W. EDWARDS, *Justice of the Peace.*"

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While in the printed form it is recited that "the parties appeared and, upon proof, I gave judgment in favor of plaintiff and against the defendant," yet, it is beyond controversy or question that the J. C. Jacobs Banking Company, either as an incorporated institution or as a partnership, did not appear, either by attorney or otherwise, and that they had not been brought before the Court either by any process served upon it according to law, or by any publication made for it as directed in attachment proceedings. The only person served with the process, or summons, was J. C. Jacobs, who must have been in Chattanooga on the date the suit was instituted. Service of this summons on him did not operate to bring before the Court the complainant Banking Company, whether it was a corporation under the laws of Alabama or a partnership doing a banking business in that State. The only effect of serving the summons upon J. C. Jacobs was to bring him before the Court, and he was not sued in the action, nor did the summons run against him, but against the J. C. Jacobs Banking Company.

The judgment rendered against the J. C. Jacobs Banking Company on the 2d of February, 1912, was not appealed from, nor any steps taken to enforce its collection until the 12th of August 19—, when an execution was issued by the Justice of the Peace from said judgment commanding the officer, "that all the goods, chattels, lands and tenements of the J. C. Jacobs Banking Company he caused to be made the sum of \$300.00, and costs of the suit, to satisfy a judgment which Security Bank & Trust Company obtained before Geo. W. Edwards, Justice of the Peace, on 2d of February, 1912, against the said J. C. Jacobs Banking Company, Defendant, and such money, when collected, paid to the said Security Bank & Trust Company, Defendant."

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This execution went into the hands of the constable on the same day it was issued, and a garnishment notice was, on that date, served on C. A. Lyerly, "the highest officer of said bank in my county to answer on 17th August, at 10 o'clock A. M." The garnishment notice served upon Mr. Lyerly was directed to the First National Bank, and commanded it to appear on the 17th of August, 1912, at 10 o'clock A.M., to answer on oath what debts it owed the J. C. Jacobs Banking Company, and what property it had in its hands belonging to said Banking Company. This garnishment notice was issued to the First National Bank, "by virtue of an execution in my hand in the favor of the Security Bank & Trust Company against the estate of J. C. Jacobs Banking Company, and was served by S. M. Tilford, D. S. On the back of this garnishment notice is an answer purporting to be made by the First National Bank, but sworn to by George D. Lancaster, as its attorney, and in this sworn answer it is admitted the First National Bank is indebted to the J. C. Jacobs Banking Company, defendant, in the sum of \$350.00. On this answer the Justice of the Peace rendered a judgment on the 26th of August, 1912, "for the Security Bank & Trust Co., against the First National Bank, Garnishee, for \$315.40."

It appears that, within two days after the garnishment judgment was rendered, the bond was made for an appeal of said judgment to the Circuit Court of Hamilton County, which bond is in the sum of \$650.00, and, after stating the style of the cause as *Security Bank and Trust Co. v. J. C. Jacobs Banking Co.*, is as follows: "We acknowledge ourselves indebted to Security Bank & Trust Co., in the sum of \$650.00. But this bond is void if said J. C. Jacobs Banking Co., and the First National Bank of Chattanooga, Tennessee, shall successfully prosecute an appeal prayed by them to the Circuit Court of said county from a judg-

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ment rendered against said First National Bank, garnishee, in the above-described cause on the 26th day of August, 1912, or if they fail to do so shall pay and satisfy all costs and damages adjudged against them by said Circuit Court for failure, otherwise this bond to remain in full force and effect."

This bond was made before the Justice Edwards, on the 28th of August, 1912, and was signed by J. C. Jacobs Banking Co., and by the First National Bank. Who signed the name of the J. C. Jacobs Banking Company, or the name of the First National Bank, does not appear from the bond, but both names are signed in a different handwriting, and, evidently, by a different person. There is no proof that any member of the J. C. Jacobs Banking Company was present in Chattanooga that day, and presumably its name was signed by its attorney.

Shortly after this bond was executed. Mr. Edington, representing the Security Bank and Trust Co., was in the office of the Justice of the Peace, and objected to it, and for that reason the papers in the case were never returned into the Circuit Court. It is charged in the bill, and attempted to be proved, that Mr. Edington promised the Justice that he would notify the attorney for these banks within the time allowed by law for an appeal to be taken, so that they could make a good appeal bond; but he failed to give the attorney such notice. This charge in the bill is not proved, though there is some evidence indicating the truth of the charge. Yet, Mr. Edington emphatically denies having made such promise, and the complainants fail to prove this allegation in their bill. Immediately after this, complainant filed the bill in this case, seeking to have both the original and garnishment judgment declared void, and to enjoin the First National Bank from paying the amount of the garnishment judgment.

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It is insisted in this case by learned counsel for complainant that both the affidavit for the attachment that was made before the Justice of the Peace, and the summons issued by him at the time the attachment was issued, are void; that the J. C. Jacobs Banking Company was never legally made a party to the attachment suit, and was in fact not a party, as the papers in the case show, and that the judgment of the Justice of the Peace, rendered by him on the 2d of February, 1912, was an absolute nullity; and being void, the execution issued therefrom, as well as the garnishment notice and judgment thereon on the 26th of August, 1912, were likewise void, and being such, complainant has a right to come into a Court of Equity and have them so adjudged and decreed and their collection enjoined. It is further insisted that the J. C. Jacobs Banking Company did not and never did owe the Security Bank & Trust Company any debt, either by note, account or on the check given to Eastman by the Trustees in Bankruptcy, or otherwise, and that if this banking company is forced by these proceedings to pay the Security Bank & Trust Co., the amount of the judgment rendered against it, on the 2d of February, that it will lose that much money, because it will have to pay the amount of this check to the attaching creditors of Eastman, who garnisheed this fund in Alabama, and for these reasons it would be inequitable to compel it to pay this \$300.00 twice, when it is holding the money in trust and receives no benefit therefrom. On the other hand, the learned attorney for the Security Bank & Trust company insists that the attachment proceeding instituted on the 30th of January, against the J. C. Jacobs Banking Company, and the summons issued and served on J. C. Jacobs, operate and had the effect of bringing the J. C. Jacobs Banking Company before the Justice's Court, and made it a party to that suit, and that his judgment

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against it was a valid judgment in Tennessee, and not a void one as insisted upon by the complainant. It is further insisted that, if the judgment rendered against the J. C. Jacobs Banking Company is valid, the garnishment proceeding and judgment against the First National Bank, rendered on the 26th of August, is also a valid judgment, and that it has a right to collect the amount of said garnishment judgment in full; and these are the questions before this Court for its decision.

If the judgment rendered by the Justice on the 2d of February, 1912, is void, then there can be no doubt that a Court of Equity will enjoin its collection and also a garnishment rendered in a proceeding to collect the amount of said judgment. 1 Head, 229; 323 Tenn. Chy., 49; 11 Humph., 523; 4 Sneed, 196; 2 Tenn. Chy., 364; 11 Heisk., 555; 5 Cold., 561; 2 Head, 599; 2 Tenn. Chy., 209-364; 2 Humph., 137; 8 Humph., 132; 3 Yer., 366; 11 Heisk., 523.

If the proceedings are merely irregular, the judgment of the Justice is not void, and cannot be attacked collaterally. 65 Tenn., 258; 59 Tenn., 625, and other cases not necessary to be cited.

It is true, however, that if the original judgment is void, then, there can be no valid proceeding to collect it, and a judgment against a garnishee of the original judgment debtor will, likewise, be void. 4 Yer., 461; Cooke, 478; 11 Lea, 583.

It is well settled that a judgment rendered against a defendant in any kind of a case, when process has never been served on him, or it, in the way provided by law; or where there has been no attachment of his, or its, property, and publication made as required in attachment cases; and where there has been no voluntary appearance of the defendant, is clearly void, and a bill in equity will lie to

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enjoin its collection. 1 Heisk., 20; 12 Heisk., 629, and other cases hereinbefore cited.

It is further, likewise, well settled that a check given by a depositor on a fund held in a bank for him, does not operate as an assignment of that part of the fund drawn on it in favor of the payee of such check. Neither can the holder of such check, drawn on a fund to the credit of the drawer, and which check has not been accepted, or where there has been no promise or agreement to pay it by the bank, maintain an action against the bank to recover from it the amount of the check. 4 Pick., 385; 38 Lea, 506; 93 Tenn., 353; 114 Tenn., 693; Negotiable Instrument Law, Section 189.

The Acts of 1871, Chapter 134, Section 1, provides that, where a suit is commenced by original attachment, it shall be the duty of the Clerk or Justice issuing the attachment, to also issue a summons against the defendant for the same cause of action; and when the summons is executed on the defendant, no publication shall be made, nor stay of judgment had; and, under Section 2, of the Act, it is provided: "That the summons shall be in the usual form, and in addition shall notify the defendant that an original attachment suit has been commenced against him."

The summons issued in this case attempts to conform to this requirement of the Act cited *supra*. The second section of the Act in question makes the summons the leading process, as was held in 7 Bax., 256, and this leading process is to be in the usual form of a summons issued by magistrates, and such as are provided for in Shannon's Code, Section 5958.

In the *Flood Case*, 122 Tenn., 71-73, and also in the *Davis Case*, 127 Tenn., 167-171, the Supreme Court held that the summons issued by a magistrate in all cases, must conform to the requirements of the statute. It is true

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these cases were not attachment suits, but were ordinary suits brought before a Justice of the Peace to recover damages; but the Supreme Court was passing upon the requirements of the statutory form of a summons issued by a Justice of the Peace, and Section 2 of Chapter 134 of the Act of 1871, requires that summonses that issue in attachment cases "shall be in the usual form", that is, such summonses shall be in the form provided in Section 5958 of Shannon's Code.

The form provided in that section of the Code is as follows: "State of Tennessee, _____ County. To any lawful officer to execute and return: Summons A. B. to appear before me, or some other Justice of the Peace for said County, to answer C. D. in a civil action by note, (or upon an account or otherwise, as the case may be,) under _____ dollars, this _____ day of _____, 18—." The above is the form of the summons required to be issued by the Justice of the Peace in attachment cases when suit is begun by an original attachment as was attempted in this case.

In the case under consideration, the name of the plaintiff whose complaint the defendant, the J. C. Jacobs Banking Company, is required to answer, is not stated. Neither is the nature of the cause of action stated in this summons, the defendant being commanded to answer, "In a civil suit for three hundred dollars," the nature of the demand, whether it is a suit upon a note, or upon an account, or for a breach of contract of any kind, or in an action for personal injury to the plaintiff, is not stated. There are two vital defects in this summons, in that the plaintiff is not stated nor is the nature of the cause of action set out in the summons; and it was held in *Davis v. Railroad*, 127 Tenn., 167, that a summons which fails to contain a brief statement of the cause of action, sufficient to give the de-

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fendant reasonable notice of what he is called upon to answer, is fatal and defective; or, in other words, is a void process, and such summons being the foundation of the suit and the judgment upon which it is based, and it being void, there is no valid suit or judgment, citing *Railroad v. Flood*, 127. Tenn., 56, and other cases. It was held in *Railroad v. Davis*, that the failure of the warrant in that case to contain a brief statement of the cause of action rendered it void, and the judgment was, likewise, void. If the warrant is void, as the Court held in that case, then there can be no valid judgment based upon such warrant.

It would seem that appearance by the defendant and making defense to the suit after such appearance, does not cure the defect and make the void warrant good in law so as that a judgment rendered thereon is valid. If the warrants in the case cited in 122 and 127 Tennessee, were void for the reasons stated by the Judges in those cases, it then certainly must follow that the warrant in this case is also void for the reason that it states no cause of action at all. The defendant is called on to answer in a civil suit for three hundred dollars. That does not state a cause of action. But it is void for the additional reason that it does not call on the J. C. Jacobs Banking Company to answer the complaint of anybody. That concern is simply required to answer a complaint in a civil suit for three hundred dollars, and if ever there was a void warrant issued by a Justice of the Peace, this one certainly was void, and being void, appearance by the defendant, or any one for it, and answering to the merits of the case, does not cure the defect or make the judgment rendered against such defendant a valid judgment. Such judgment must be, in the very nature of things, void, for the reason that the foundation upon which it is based is void. If the judgment is void, and the writer thinks it is, it follows

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that all proceedings had to enforce its collection are likewise void.

But, some of the members of this Court are in doubt about the warrant issued in this case being void, and are inclined to the opinion that the affidavit, attachment and bond made by the Security Bank & Trust Company cured the defects suggested as appearing in the warrant, inasmuch as they show that the proceedings were in favor of the Security Bank & Trust Company, and that the affidavit states the nature of the cause of action. The writer does not agree with what the majority of the Court seem to hold.

It is conceded that the foundation of this action against the J. C. Jacobs Banking Company is the check issued by the Trustees of the Bankrupt to Mr. Eastman. Neither the affidavit attachment or other papers in this case, in stating the nature of the plaintiff's claim against the Jacobs Banking Company, refers to a check or mention it. The cause, or foundation of plaintiff's action, is not stated anywhere in either of these four papers, except in the affidavit signed by Mr. Edington, in which the recital is that "J. C. Jacobs Banking Company is indebted to Security Bank & Trust Company in the sum of \$300.00 by (note) (account)." This is the only recitation in either of these papers that undertakes to state the nature and character of the claim of the Security Bank & Trust Company, and this does not disclose to the defendant, the J. C. Jacobs Banking Company, whether it is sued upon a note, or upon an account, or upon what the suit is founded.

As stated *supra*, this form of an affidavit was unquestionably in common use by the justice in all cases, and was intended to be so changed as to conform to any particular character of suit, and was not intended, and could not have been intended, to state the nature and character of

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plaintiff's suit in this case. The writer is of the opinion that neither the affidavit, bond or attachment, although all of them were printed on the same sheet on which the summons issued in this case was printed, cured the defects pointed out in the summons. The statute does not provide for having these four papers all on the same sheet. It does expressly state the form of the summons, or warrant, to be issued by the Justice of the Peace, and the form prescribed in the Code expressly requires the summons to state who the defendant is required to answer, and the nature of his cause of action, and this summons does not conform to the requirements of the statute in either particular; and it was held in *Railroad v. Flood*, and *Railroad v. Davis*, *supra*, that the summons much conform to the requirements of the statute, and failing to do so, it is a void process. If the Supreme Court is to adhere, and does adhere, to its holding in these two cases, then it seems to the writer beyond question that the summons issued in this case was absolutely void process, and that if the defendant, the J. C. Jacobs Banking Company, appeared by any of its officers, or by an attorney, and defended on the merits of the suit, still the judgment rendered against it after such appearance is a nullity, and all proceedings to enforce it are likewise nullities.

The majority of the Court, however, are not inclined to take this view of the summons issued in this case for the reasons stated above. It might be proper to add that the original attachment papers issued by the Justice in this case, were sent up with the record, and are now before the Court, and these criticisms of them are based upon their appearance on the face of each paper.

But, the Court is of the opinion that, at the time the Justice of the Peace rendered the judgment against the J. C. Jacobs Banking Company, it was not before the

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Court, and for that reason the judgment rendered against it was a nullity, and all proceedings to enforce it, including the garnishment proceeding and judgment, were likewise nullities. The return of the officer who served these papers shows that the summons was "executed on J. C. Jacobs, the highest officer of said company in the county." It is admitted, and could not be disputed, that the J. C. Jacobs Banking Company was either a non-resident corporation, or a non-resident partnership. It was not a resident of Tennessee, nor doing business in any place in Tennessee, either as a partnership or a corporation. We have no law in this State providing for suing a non-resident corporation, or a non-resident partnership, and bringing either before the Court in the manner in which it was done in this case.

Section 4539 to and including 4542 of Shannon's Code, provides how process may be served upon a resident corporation, that is, one chartered and doing business in this State, and it may be these provisions apply to and cover the case of a non-resident corporation who has an office and is doing business in this State. But it is manifest that these sections of the Code do not cover this defendant, nor include it within its provisions, for the evident reason that it was not a Tennessee corporation, chartered under the laws of this State, nor was it a domesticated corporation with an office or agency and doing business in any county in this State.

Section 4543 to 4546 provides how a corporation claiming existence under the laws of any other State may be sued in this State, but such suit must relate to a transaction had in whole or in part, within this State, or to a cause of action that arose in this State. In such a case, Section 4545 provides that process may be served upon any agent of said corporation found within the county

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where the suit is brought; but the service of this process in this case was not had and done in conformity to this statute. Its requirements were not complied with, even if the suit had been to enforce a cause of action that arose in this State, or related to a transaction had in whole or in part within this State, and the suit in question was not such an action. The transaction which is the basis of this suit, was had in the State of Alabama. The check which is the basis of this action was given by trustees living in Alabama, and while they were in Alabama, and on a fund that was in a bank doing business in the State of Alabama, and, hence, this transaction did not arise in whole or in part in Tennessee, but altogether in the State of Alabama.

As is evident, the Security Bank & Trust Company had no cause of action against the J. C. Jacobs Banking Company on the check in question, because the latter had never accepted it, and had never, in any way or at any time, agreed and promised to pay it; so that the cause of action in this case did not arise in Tennessee, but if plaintiff had any cause of action at all, and we do not think it did, it arose in the State of Alabama when J. C. Jacobs Banking Company refused to pay the check in question.

It is manifest, therefore, that if the J. C. Jacobs Banking Company is a non-resident corporation, it was not brought before the Justice of the Peace, or his Court, by the service of the process on Mr. Jacobs, as was done by the Constable, or Deputy Sheriff, in this case. It is therefore manifest, and cannot be disputed that, if it is a non-resident corporation, the judgment rendered against it upon service of process in this manner, did not operate to bring it before the Justice, nor authorize him to render any judgment against the J. C. Jacobs Banking Company, and, for that reason, such judgment against it, as a non-resident corporation, is a nullity, and all proceedings to

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enforce such judgment, including the garnishment proceeding, are likewise nullities.

If the J. C. Jacobs Banking Company is not a corporation, but a partnership, and if J. C. Jacobs is a member of such partnership, one of the firm, service of process upon him in a case like this, certainly did not operate to bring before the Justice of the Peace's Court the partnership of the J. C. Jacobs Banking Company. In such case, service of process upon J. C. Jacobs could only operate, and did only operate, to bring him before the Court, and did not authorize, and could not authorize, the Justice to render a judgment against the J. C. Jacobs Banking Company. For service of process in a case like the one under consideration, could bring before the Court only the person on whom process was served, and could not, and did not, bring before the Court the partnership so as to authorize a judgment against it in its partnership name. The justice would only be authorized to render a judgment in such case against the person on whom process was served. The judgment against him, if one was rendered, would be a valid judgment; but a judgment in such case against the J. C. Jacobs Banking Company would be a void judgment.

For these reasons this Court is of the opinion that the judgment rendered by the Justice of the Peace on the 2d of February, 1912, against the J. C. Jacobs Banking Company, was void, and that the garnishment proceeding and judgment subsequently had and rendered to enforce this judgment were likewise void, and that the complainant is entitled to the relief sought in and by its bill; that the decree of the Chancellor dismissing it was error, and it is, therefore, reversed and a decree will be entered in this Court granting complainant the relief sought in and by its bill, and the Security Bank & Trust Company will pay the cost of all these proceedings.

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LEVY ROBERTS v. N., C. & ST. L. RAILWAY.

Affirmed by Supreme Court, 1915.

CHANCERY PRACTICE. *Dismissal of bill after hearing and before decree.*

A complainant in a chancery cause may with the consent of the chancellor dismiss his bill after answer filed, proof taken and cause heard and taken under advisement, where there is no cross bill and no decree for an accounting, or where defendant has acquired no peculiar right.

FROM HENRY COUNTY.

Appealed from the Chancery Court of Henry County.
J. W. Ross, Chancellor.

TAYLOR & HUDSON for Complainants.

LAMB & FITZUGH for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THE question presented for determination is whether the Chancellor, before any decretal order and in the absence of cross bill or counter claim, can dismiss a suit in equity without prejudice after it has been taken under advisement by him. We answer this question in the affirmative after a careful investigation of the practice books and of the decisions which throw light upon the subject.

On November 14, 1913, Roberts filed his bill against the defendant Railway Company and one Hills, an agent

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of the Railway Company at Puryear, to recover the value of five hogsheads of tobacco which were consumed in a fire which destroyed the depot at Puryear on the 16th day of June, 1913. The theory presented by the bill was in the main that the tobacco had been stored at intervals in the station house to await shipping orders; that on the 15th or 16th of June an order had been given to the railroad company to load the tobacco and ship it at such time or with such speed as to reach the Paducah market on the morning of the 17th of June; that the railway company and the agent were negligent in obeying this shipping order and in delaying the loading of the cars, in consequence of which negligence a fire occurring on the 16th of June destroyed the tobacco. While not made prominent, it may be said that the bill also presented the theory of carrier liability arising upon the receipt of the tobacco at Puryear. A discovery was sought; at least the oaths of the defendants to their respective answers were not waived.

Hills answered under oath and his co-defendant answered under seal. The substance of the answers was that the tobacco had not been delivered to the railway company as a carrier, but had been delivered at intervals for the accommodation of complainant and to await the accumulation of a carload before shipping orders were to be given; that the railway company was not responsible for the fire and was not guilty of any negligence causing it; that it was not guilty of any negligence with respect to shipping orders, but was prompt and diligent in making the arrangements to transport the tobacco in accordance with its custom and duty, which was known to complainant.

It is disclosed by the record that at the February term, 1914, some exceptions to the answers were adjusted by some stipulations with respect to the facts, and that the

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cause was continued to another day or to the next term. No proof seems to have been taken. Some affidavits filed with the transcript seem to have been treated as parts of the answers. While as we have stated, the February record entry shows no submission of the case, we find an entry of final decree at the December, 1914, term, containing a recital that the cause had been taken under advisement by the Chancellor at the preceding February term. This final decree was simply to the effect that complainant's solicitors had moved the Court for permission to dismiss their bill without prejudice and that the Court had granted this motion and dismissed the bill upon complainant paying the costs. That which is shown by the record is simply a voluntary dismissal of a Chancery case before any decree on the merits, or as to that matter any decretal order whatever. It will be noted also that the order of dismissal is silent as to the real reasons or motives prompting the solicitors to make the motion and causing the Chancellor to allow the dismissal. Hence, while there is no reason shown for the dismissal, at the same time, it being a matter at least in which the Chancellor had some discretion, it is not far-fetched to presume that he had some reasons which evoked its exercise.

We have not deemed it necessary to enter upon a discussion of the question of liability of the railway company to the complainants. Whether liable or not was a question which could be determined upon final hearing only. We are simply concerned with determining whether or not a complainant may voluntarily dismiss his suit in the face of a strong presumption that he would lose upon final hearing. We have no statute in Tennessee bearing directly upon the question. It is too plain for argument that Code section 4689, Shannon, has reference to Circuit Court and jury trials and not to proceedings con-

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ducted according to the ancient forms of equity. The only statute that remotely bears on the question, and this bearing may be not so remote after all, is that of section 4446 of Shannon's Code, authorizing the institution of new suits within one year after termination of a preceding litigation upon matters not involving the merits. This section has specific reference to suits in equity as well as at law, and embraces voluntary dismissals of the one as well as the other. Hence, we need not discuss at length the inserting or the leaving out of the words "without prejudice," as that would be the legal effect anyhow.

We have examined the decisions in our State bearing upon this question, with the following result: The general rule is that a complainant may dismiss his bill at any time before decree pronounced, upon the payment of costs. *Gillespie v. McEwen*, 1 Shannon, 400; *Stone v. Huggins*, *Idem*, 564; *Croft v. Johnson*, 8 Baxter, 393; *Fisher v. Stovall*, 1 Pickle, 316; *Moore v. Tillman*, 22 Pickle, 361. This rule is not affected by the fact that the bill has been read and the evidence heard. *Mabry v. Churchwell*, 1 Lea, 416-424. All the authorities cited agree that this is the general rule; and this proposition is based upon the numerous authorities which deal with the practice of the High Court of Chancery of England, which practice we follow implicitly except as modified by our statutes. *Chicago & Alton Railway v. Dumont*, 109 U. S., 702; *Rex v. Carlyle*, 11 English Ruling Cases, 9. Attention in particular is called to the case of *Watt v. Crawford*, 11 Paige, 472, wherein Chancellor Walworth announces the general rule to be just as stated, and proceeds to enumerate all the exceptions thereto, none of which exceptions has direct application to the case at bar. Our own decisions refer to exceptions to the general rule; but an analysis of all of them brings to light the further rule that a dismissal

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must be granted when requested if no decree in which a defendant has acquired an interest has been passed; and especially must the request be granted when no decree whatever has been announced or an order made, as in the case at bar. The exceptions numerated seem to be as follows: Where a cross bill has been filed and treated as an independent or cross action and prosecuted by the defendant to issue: *Moore v. Tillman, supra*. Secondly, where an accounting has been ordered or a reference had, in consequence of which the defendant has shown himself entitled to certain recoveries or certain equities. Thirdly, where an issue of fact has been submitted to a jury and determined by them in favor of defendant. Over and above all these is the one rule to the effect that a dismissal must be allowed at request of complainant when no decree or order or reference has been made, asked or entered.

In no single case has the question of the inconvenience of a defendant in preparing his defense or the annoyance or anxiety suffered by him because of a likelihood of his being again hailed to Court been considered by the Courts as a controlling reason for disallowing a voluntary dismissal.

It results from the foregoing that we do not think that the railway company can legally complain of permission granted Roberts to dismiss his bill. The decree of the Chancellor is therefore affirmed. Complainant will pay the costs accrued up to the time of the Chancellor's decree. Defendants will pay the costs of this Court.

Dews v. Dews.

BEULAH DEWS v. B. R. DEWS.

Writ of certiorari denied, 1915.

1. **DIVORCE AND ALIMONY.** *General allowance. Bill for specification and enforcement.*

A wife to whom a divorce and alimony were decreed, including reasonable support for herself and child, may at a subsequent term file a bill or petition in the cause for the purpose of having her allowance made more specific and for greater security and regularity in its payment.

2. **SAME.** *Diminution. Rights of husband.*

In such case where the Court fixes the amount the husband may at later periods make application to the Court for a modification where the amount allowed is too large or the terms too rigid.

FROM DAVIDSON COUNTY.

Appeal from the Second Circuit Court of Davidson County. M. H. MEEKS, Judge.

A. J. GRIGSBY for Petitioner.

R. P. DEWS for Defendant.

MR. JUSTICE MOORE delivered the opinion of the Court.

THE complainant and defendant have been husband and wife, and on the 6th of December, 1912, she was granted an absolute divorce from her husband, B. R. Dews, upon a bill filed by her against him, when the case was heard on the record and oral testimony, and the bonds of mat-

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trimony between them forever dissolved. In such decree the following is recited:

"It is further ordered, by the Court, that the complainant be given the exclusive custody and control of the minor child, as mentioned in the bill, to wit, Lawrence Dews. It is further ordered by the Court that defendant shall support said child."

On May 9, 1914, the complainant in the divorce suit, Mrs. Dews, filed a petition in the original cause against the defendant Dews, setting out the fact that she was granted an absolute divorce from her husband on December 6, 1912, and that in such decree she was given the exclusive custody of their boy, Lawrence Dews, who was, at the date of said decree of divorce, about eleven years old, and that in said decree of divorce the defendant Dews was ordered to support said child, their little boy, Lawrence Dews. It is charged in the petition that the defendant had, since the date of the decree of divorce, been paying complainant ten dollars per month and had furnished their boy a limited amount of clothing but not a sufficient quantity or quality to keep him adequately clothed or to be in keeping with his station in life. She thereupon states in her petition what she estimates to be a sufficient amount of money with which to support their son, and charges that it would require thirty dollars a month, and that as he grows older the expenses are increased and are correspondingly greater, and she asked that said sum be increased at the rate of two dollars per month until the further orders of the Court.

The defendant was served with a copy of the petition, which he answered, and insists that he had furnished his son all the proper clothing, necessities and money that he needed, and what he had furnished to his son amounted

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to nearly twenty dollars per month for each month since the decree of divorce was entered in the cause, and he insists that the amount so furnished by him was sufficient for all the necessities of their child, and that he had in fact and in this way complied with the orders of the Court to support their child.

By agreement of counsel a reference was made to the Clerk of the Court to take proof and report, first, what is the financial standing of Defendant Dews; second, whether or not the defendant has been obeying the formal decree of the Court in this cause; and, third, what would be a reasonable allowance for the support of the minor child, Lawrence Dews. On this order of reference the Clerk took the depositions of a number of witnesses, and from the proof on file in his office, reported first, that defendant's financial standing consisted of an uncertain salary as a railroad man ranging from \$125.00 to \$150.00 per month; second, the Clerk reported from all the proof, that defendant had obeyed the order to support this little boy, both in spirit and in fact; third, the Clerk reported from all the proof that twenty dollars per month would be a reasonable allowance for the support of the child.

There were exceptions to this report, but these exceptions do not appear to have ever been acted upon by the trial Judge. In his final order it is said: "This cause came on to be heard, as well as on a former day of this term, . . . upon motion of the complainant to try, hear and dispose of the report of the Clerk in this cause, exceptions thereto and appeal therefrom to this Court. Upon argument of counsel and due consideration thereof, the Court is pleased to disallow and dismiss the complainant's petition in this cause, and all motions and pleadings thereunder." Thereupon complainant's petition was dismissed, and she was taxed with the costs of the same, and

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her motion for new trial being overruled, she had prayed an appeal to this Court and assigned as error the action of the trial Judge in dismissing her petition.

Quite an elaborate argument has been made in the briefs of learned counsel in support of the right of complainant to file this petition and in denial of her right to do so, but we think there can be no reasonable controversy about the right of complainant to file her petition and compel her former husband to comply with the orders, judgments and decrees of the Court directing him to support the minor child of these parties. We do not deem it necessary to cite authorities to sustain this position. It was the duty of the defendant to support his minor child whether the Court, when granting the divorce, so decreed or not. Having given its mother the exclusive custody and control, then, under the holdings of the Supreme Court in the case of *Evans v. Evans*, 125 Tenn., 112, it was the legal duty of the defendant to support his little boy, even if the Court had not so ordered him. But in this case the Court ordered and directed the defendant to support their minor child, and, hence, there is placed upon him not only his legal duty to do so, but a direct order of the Court committing the custody of the child to its mother when she was granted a divorce.

Defendant insists, and such is the burden of the argument of his able counsel, that he has fully complied with the orders of the Court, and has supported his little boy in every way he should be required to do; while the complainant's counsel, with as much vigor and ability, contends that while he has contributed some to the support of his child, yet, he has not discharged his full duty in this respect. In her testimony, complainant admits that her former husband, the defendant, has paid her regularly ten dollars per month for the board of the child, but complains

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that he has wholly failed to furnish him with sufficient clothing and other necessities, as well as such necessary money as she is compelled to have to pay his laundry bills, car fare, school books, and other little things that it is absolutely necessary for a child to have when growing up and going to school. She likewise insists in her deposition that the boy is not kept properly clothed, and the proof indicates that defendant furnishes him only two suits of clothing each year, one in the spring and one in the fall; and it is insisted that that is insufficient, and that the boy having but one suit each season never has proper clothing to wear to Sunday school, church and other places that it is necessary for him to go. It is further insisted by petitioner that often when such things as clothing are needed, she finds it a difficult matter to induce the defendant to buy them, and that he frequently delays purchasing needed articles, until the boy is sometimes nearly barefooted and his clothes ragged and greatly worn. For these reasons she desired the Court to fix a certain stipulated amount to be paid by the defendant each month for the support and maintenance of their boy, so that she will not be subjected to the disappointments and refusals on the part of her former husband to buy him such things as he needs and when he needs them.

Defendant, on the other hand, insists that if he is required to pay to complainant a certain stipulated amount each month, she will use a part of it in dressing herself, and will not use all of it in supporting and clothing their boy, it being said by him in his testimony that she is a handsome, vain woman, who likes to dress well. In reply to this she states that she is perfectly willing for the Court to order defendant to pay the monthly allowance into the hands of the Clerk of the Court, or into the hands of some one appointed as the boy's guardian, to be by such person

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expended for the benefit of the boy. She insists that she ought not to be subjected to the annoyance and inconvenience of having to run after and beg her former husband for money with which to clothe and support their child, and we are of the opinion that her insistence in this respect is not unreasonable.

The decree of divorce granted to her, dissolving the bonds of matrimony between husband and wife, recites that it is because of his cruel and inhuman treatment toward his wife, the petitioner in this case. It appears that, since the divorce was granted complainant, defendant has contracted another marriage, and has by that wife a child, and that they are living with his second wife's mother. In such condition of affairs it certainly must be rather humiliating to complainant to be compelled to either in person ask defendant for money with which to support their boy, or to send him to his father for things that he needs; and we think it a reasonable request on her part that he be required to pay a certain, definite, fixed amount each month to someone to be used in supporting and maintaining and educating his child.

While some of the evidence indicates that the cost and expense of living at the time the depositions were given, were no greater than when the divorce was granted in 1912, yet, the members of this Court have had experience along these lines themselves, and they know, as a matter of fact, for it is common knowledge to everybody, that the cost of living since the divorce was granted has very considerably increased, so much so that public-spirited men and committees in different parts of the United States have undertaken to investigate the causes thereof. So that, we do not place much value upon the testimony of the witnesses who say that the cost of living was no more when

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this proceeding was heard than when the divorce was granted.

Defendant has taken the depositions of merchants with whom he deals in Nashville to show that he has bought a sufficient quantity of clothes for the boy, and clothing of the proper quality for a boy of his station in life. Some of the members of this Court have also had experience in buying clothing and other necessities for boys, and they very well know that a young, healthy, active, vigorous boy wears out clothing mighty fast.

The defendant seems to higggle about the amount of the laundry bill each month paid for his child, and insists that one dollar a month is sufficient for that purpose. It is our observation that a boy who romps and plays with his little associates, is in constant need of a change of clothing, and that his part of the laundry is generally the largest that goes to wash, and we are quite sure that it would be almost impossible to find anybody who would take the contract to do his laundry work for one dollar per month. Living in a city like Nashville, a boy eleven years old would necessarily need more or less money for car fare, school books, school supplies and various other little things that come up that a father never thinks of, but which is constantly before the mind of the mother, and these little items in the aggregate amount to considerable sum at the end of the year.

It is common observation that a young, vigorous, healthy boy, eleven or twelve years old, will eat as much as a man, unless he happens to be a laboring man, and while it is not usual to pay as much for such boy's board, as is paid for that of a grown man, yet it really costs about as much to feed such a boy as it does a grown man. This record indicates this to be true, and the writer of this opinion, from observation and experience, knows it to be true.

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We do not think twenty dollars a month is a sufficient amount to meet all the necessary requirements of this little boy. While he has not had much sickness since the divorce was granted, that is no guarantee that he will not in the future. His eyes seem to be in bad shape, and we know from experience that a person who wears glasses is often liable to break them. In fact, there are a great many little incidental expenses connected with the raising, maintaining, educating and supporting a boy that the husband and father knows but little and thinks but little about, but which the attentive, loving, caretaking mother watches and looks after with constant fidelity.

In the case of *Evans v. Evans, supra*, the divorced wife sued her divorced husband for the sum of \$450.00, the amount she alleged was required for the support and maintenance of their daughter who was fifteen or sixteen years old, from April 8, 1910, to December 1, 1910, a period of not quite eight months. The Supreme Court in passing upon this allowance, gave her a judgment against her former husband for the amount she sought to recover in that case. The girl in that case was about four or five years older than the boy in this case. She was the daughter of parents who were evidently not in a good financial condition, while the divorced wife was evidently a poor woman living in New York. If the amount allowed her in that case was just and proper, then certainly twenty-five dollars per month would not be an unreasonable amount to allow for the support of the child in this case.

We have reached the conclusion that this defendant, during the next twelve months, beginning from the date when this cause reaches the Circuit Court of Davidson County, should pay, at the end of each month, the sum of twenty-five dollars, to be used in supporting, maintaining and educating his boy. This money he will pay to the

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Clerk of the Circuit Court of Davidson County to be by the Clerk paid to a regular guardian of Lawrence Dews, and then to be used by said guardian in the support, maintenance and education of his son. If she fails to have such guardian appointed, then the Clerk will expend said fund, under the suggestions of complainant, in the support and maintenance of this boy.

This order will be enforced for one year only from the date mentioned, and if at the end of that time the defendant's financial condition has changed for the worse, he may make application to the lower Court for its reduction; but if his financial condition has not so changed, or has improved, the petitioner may ask for some increase in the allowance per month, provided it is made to appear to the lower Court that the child's necessities require such increase.

This cause will be remanded to the Circuit Court of Davidson County to carry into effect this order, and the defendant, Dews, will pay all the costs of this proceeding.

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B. E. NORRIS v. L. & N. R. R. ET ALS.

Writ of certiorari denied by Supreme Court, 1915.

1. REVERSAL. *Harmless error. Instructions.*

Where plaintiff has recovered a verdict establishing his right of action for negligence against defendant, there will be no reversal for errors in the charge of the Court with respect to the degree of care of the defendant or as to other breaches of duty; nor will there be any reversal for refusal of the Court to give proper requests for additional instructions as to liability. All these errors will be treated as harmless.

2. RAILROADS. *Burning of weeds and rubbish on right of way.*

A railway company in performing its duty of keeping its right of way clear of inflammable materials may set fire to weeds and rubbish thereon; but in so doing it must exercise care commensurate with the dangers.

3. SAME. *Contributory negligence of adjacent landowners.*

An adjacent landowner who is made aware of the fact that a fire set out upon the right of way of a railroad company is moving towards his premises and will spread thereto and do damage, is under obligation to exercise ordinary care and diligence to intercept the fire and prevent or lessen the damages; and his damages may be mitigated by reason of his failure so to do. But he would be entitled to compensation for the trouble and expense to which he was put.

4. DAMAGES. *Special request. Punitive damages.*

A party who relies upon his right to recover punitive damages must call the attention of the Court thereto by special request when the Court has undertaken to charge at length upon the subject of damages and has omitted the matter of punitive damages.

FROM HAYWOOD COUNTY.

Appeal in error from the Circuit Court of Haywood County. T. E. HARWOOD, Circuit Judge.

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KINNEY & WILLS for Plaintiff in Error.

J. W. E. MOORE & SON for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

WE shall speak of the parties as plaintiff and defendants, just as they appeared in the lower Court. This was a suit by plaintiff to recover damages of the defendants for the alleged wrongful setting of fire to or permitting fires to spread to the premises of plaintiff in Haywood County. The second count, averring the negligent spreading of the fire to have been due to sparks from a defective engine, was properly eliminated by the lower Court for the reason that there is no evidence tending to show that such was the case. In the first count plaintiff averred that he was the owner of a large body of land alongside of and adjacent to the right of way of the railroad in Haywood County, part of which was cleared and the other in valuable timber; that defendant Smith was the section superintendent or foreman having in charge the right of way which passed through or adjacent to plaintiff's farm; that in November, 1913, at a time when leaves, grass and shrubbery were exceedingly dry, defendant Smith and his underlings negligently set out a fire on this right of way and negligently failed to extinguish the fire before leaving it, in consequence of which plaintiff suffered the loss of some ten thousand dollars, for which he sued. He also averred that defendants were guilty of gross, wanton and oppressive conduct in the setting out of and managing the fire.

The case was tried before the Court and jury upon the pleas of not guilty and denial of ownership. The result was the returning of a verdict of \$150.00 in favor of plaintiff. The defendants acquiesced in this verdict and sought

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no new trial. Plaintiff, however, was dissatisfied, and moved the Court for a new trial, specifying many grounds. The Court overruled this motion and pronounced judgment. Plaintiff being still dissatisfied, perfected his appeal and is here assigning numerous errors, all of which shall be treated by us, but not separately.

Before entering upon a discussion of the matter of the errors assigned, it is well that we remark that the jury by their verdict settled for all time the question of negligence and liability set forth by plaintiff in his declaration. This verdict must be treated as a finding that the defendants had breached some legal duty which they owed the plaintiff and were responsible to him for all the damages which proximately and naturally flowed from said violation of obligation. It would be useless to attempt a solution of all the elements of this verdict, or to make an effort to determine why the triers of the facts concluded that the defendants were in the wrong. Hence, whether the jury predicated their finding upon the propositions submitted by the Court at the suggestion of the defendants, or whether they concluded that some of plaintiff's grounds of action were meritorious, is a question with which we need not very much concern ourselves. Plaintiff secured that for which he was striving in the first instance, namely, a verdict convicting the defendants of negligence and fixing responsibility for some damages.

Assuming, but without deciding, that every proposition of law with respect to the liability of the defendants advanced by learned counsel for the plaintiff is sound, still, would the result have been in any respect different? If we are unable to so determine, then we are irresistibly driven to the conclusion and position that all errors pointed out were immaterial and non-prejudicial and can therefore not be made the basis of a reversal, however palpable the errors

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that were committed in the lower Court. Acts 1911, chapter 32. Or, as stated by our Supreme Court in a very early case: "If the Court can see that the verdict would have been the same whether the jury had been instructed as appellant contended or as it was, a new trial ordered for the purpose of having a correct charge would be absurd. *Mitchell v. Churchman*, 4 Humph., 218."

Assignments of error Nos. 3, 4, 5, 6, 7 and 8 will be discussed by us in conjunction. In the third assignment it is claimed that the Court erroneously gave in charge one of defendants' special requests in substance that if the defendants had set fire to the grass and rubbish on the right of way and the plaintiff knew of the fire, it was then the duty of the plaintiff to exercise the care and prudence of an ordinarily prudent man to protect his property from destruction; and for any destruction of his property to which his failure to exercise ordinary care and prudence proximately contributed he cannot recover, notwithstanding the servant of the railway company may have been negligent. It is insisted that this instruction was not sound law, and besides was in contravention of the proposition contained in the main charge. It is contended that it amounted to a denial of the right of recovery for any property destroyed, notwithstanding the fire was communicated to his premises. The instruction criticized certainly went to the extreme of the law in making plaintiff's right of action for damages dependent upon his activity after the fire had been set out on the right of way. At the same time it seems to be well established by numerous Courts that it is the duty of a land owner who is aware that a fire on the railroad right of way is raging and likely to spread to his premises to exercise ordinary care and prudence to check the spread of flames. See *Brunner v. Railroad*, 39 L. R. A. (N. S.), 166, and cases mentioned in the extended note thereto.

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Our State has adopted the rule requiring active intervention and diligence upon the part of persons injured to minimize the consequences of another's negligence, and denies a right of recovery for those things which could have been saved from destruction by the exercise of ordinary care. *Parker v. Meaders*, 86 Tenn., 181. But he ought to recover for the trouble and expense occasioned by defendants.

If the instruction be interpreted as a statement that there could be no recovery of anything if the jury found that Norris did not become active after he discovered the fire on the right of way, it was a harmless instruction in so far as plaintiff is concerned, for the reason that the jury found that he was not guilty of this barring contributory negligence and was entitled to recovery. Hence, it must not have affected the issue primarily determined by the jury.

The basis of the fourth assignment is that the Court charged the jury that the mere fact that defendants set fire to grass on its right of way in a dry time is not of itself proof of negligence. If erroneous, this instruction had nothing to do with the findings of the jury. In the fifth assignment of error it is said that the Court erroneously instructed the jury that if the defendants had set fire to the grass and rubbish on the right of way at a time and in such manner as a reasonably prudent man would have done, and that the servants of the railway used ordinary care to prevent the spreading of fire to the premises of plaintiff there could be no recovery. Conceding that this was erroneous, it was another harmless instruction. The jury found that defendants did not exercise care and prudence.

In the seventh assignment it is claimed that the Court erroneously told the jury that if Smith and crew in the

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exercise of proper care and on a proper occasion determined to burn off the right of way, and did so, exercising ordinary care and prudence in trying to prevent the spread of the fire, and that they put out said fire on the day on which it was set out, and before leaving it a man of ordinary care would have regarded it as safe, and that there was no danger of the fire spreading, and that thereafter the fire again sprang up from chunks on the land by reason of being fanned and blown by the wind, neither of defendants would be liable for the damages which occurred after the fire had started anew, etc. We cannot say that we entirely approve of this instruction. At the same time, we cannot discover that the statement was in the least harmful to the plaintiff. In the eighth assignment it is said that the Court erroneously stated that the railroad company had a right to burn off its right of way, but that it must do so under such circumstances as a reasonably prudent man would have observed or done. We do not see that the plaintiff was prejudiced by this instruction.

The contention of able counsel for plaintiff is that correct instructions should have been given so as to have impressed the jury that the defendants were greatly in the wrong, and that the rights of the plaintiff had been unjustifiably invaded, to the end that the jury, being thus imbued with the sense of the plaintiff's wrongs, would have awarded a much larger verdict. Particularly is it said that the Court should have given in charge to the jury the substance of the Acts of 1907, chapter 397, known as the Forestry Law, as the measure of defendants' duty. In this connection it is contended that this statute made the conduct of the defendants criminal, and that for such conduct the plaintiff was entitled to punitive damages. And from this argument, ingeniously made, the right to have a reversal and a remand for a new trial is pressed upon us.

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There are two answers to the insistence which is thus so forcibly made. In the first place, the trial Judge undertook to instruct the jury elaborately as to the measure of damages, and particularly upon the subject of mitigation of damages. The reverse of this latter proposition, namely, that of punitive damages, was certainly connected with the subject of damages, not as a distinct subject, but as one feature of damages omitted from the instructions upon this phase of the case. Hence, according to a well established rule there should have been a special request. Again, we are unable to discover in the evidence, premitting for the time the question of criminal liability, anything which would suggest that the defendants acted willfully, wantonly or oppressively in the handling of the fire. Again, if it be conceded that defendants were guilty of violation of the criminal laws, plaintiff must be held to have lost his right to punitive damages by not calling the attention of the Court thereto by a special request. We feel constrained for the foregoing reasons to overrule as non-prejudicial all the assignments of error made, from Nos. 3 to 8, inclusive.

In assignments Nos. 1 and 2, it is said that the verdict of \$150.00 is so inadequate as to indicate passion, prejudice or caprice, and that there is no evidence to support the verdict for the small amount rendered. We have carefully and critically examined this record and reached the conclusion that, while in our opinion the verdict could well have been for a larger sum, we are without legal warrant for reversing and remanding upon the grounds set out in the assignments under consideration. With respect to the contention that there is no evidence to support the verdict, it suffices to say that numerous witnesses estimated the damages at from \$100.00 to \$150.00. One or two of them put the damages at merely a nominal figure. Others gave

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reasons for their assertion that plaintiff's loss could not have exceeded \$150.00. It was for the jury to determine whether the testimony of these witnesses was to be accepted in preference to the evidence of plaintiff's witnesses, who estimated the damages to have been from \$6,000.00 to \$8,000.00. This was certainly a wide disparity; but it was for the jury to determine which was the more credible. Again, while not very cogent, there was some evidence that plaintiff carelessly went off and left the fire after it had started burning, and was therefore guilty of negligence which would mitigate the recovery. If the jury so believed, there was an additional reason for placing the recovery at a small figure.

No Court is ever able to determine those things which influence jurors; nor can a reviewing Court have the boldness to assert that the jurors should have accepted the testimony of one line of witnesses to the exclusion of the others. Nor can a Court say that the jury should have ignored the statements of any witness who undertakes to detail the elements of a transaction. In the case at bar numerous witnesses gave reasons for placing plaintiff's damages at a small figure. If the jury accepted the statements of these witnesses as controlling we are powerless to remedy any wrong done plaintiff in failing to believe his theory.

We feel constrained to overrule all the assignments of error and to direct an affirmance of the judgment below. Plaintiff will recover of the railway company the \$150.00 verdict, with interest and costs, but plaintiff will be taxed with the costs of this appeal.

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LUCY K. HALL AND HUSBAND V. R. G. ASHFORD ET AL.

Writ of certiorari denied, 1916.

1. SALES OF LAND. *Subdivisions. Restrictions as to use.*

The owner of a body of land who has sub-divided it and put it upon the market may in his several deeds prescribe the uses to which it shall be put and particularly the restrictions as to buildings.

2. SAME. *Sub-vendees. Other vendees.*

In such case all sub-vendees are bound by such restrictions, and all adjacent and other vendees in common acquire rights with respect thereto which may be enforced.

3. SAME. *Kind of interest. Equitable.*

Such parties acquire what are called equitable easements, and these easements are cognizable in equity and may be enforced by injunction and sometimes by specific performance.

4. SAME. *Action at law.*

But there is no right of action for damages at law for the failure of a vendee to observe the requirements.

FROM SHELBY COUNTY.

Appeal in error from the Third Circuit Court of Shelby County. T. B. PITTMAN, Judge.

BELL, TERRY & BELL for Plaintiff in Error.

——— for Defendant in Error.

MR. JUSTICE MOORE delivered the opinion of the Court.

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THE questions involved in this case are of first impressions in this State. Plaintiff filed his declaration to which the defendants demurred and the demurrer being sustained and the suit dismissed they have appealed in error to this Court and seek a reversal upon the ground that the trial Judge should have overruled the demurrer and required defendants to plead to the declaration.

It seems that the defendant Snowden owned a body of land in the city of Memphis which was called the Snowden Homestead, and which they had subdivided into town lots, just how many lots there were in the subdivision does not appear, nor is it material. These lots were sold by the Snowdens to different purchasers on which to build residences and to be used for no other purpose than residence property. On the 7th of September, 1911, the defendants Brinkley and J. B. Snowden, as the executors and trustees under the will of Robert B. Snowden, sold and by deed conveyed to the plaintiffs a certain lot in the Snowden Homestead subdivision, and in the deed that was executed to the plaintiff, Mrs. Hall, conveying to her the lot in question, the following clause was inserted: "As part of the consideration the grantee herein, for himself, his heirs or assigns, expressly accepts this deed with the following limitations and restrictions to the use and occupancy of the property to be in force until December 31, 1935. That the property shall not be used for any other than residence purposes for white people, except lot number one, which may be used for a church. That no main building shall be erected on this lot the fair cost of which is less than \$5,000.00. That no building shall be erected on the lot hereby conveyed except at a distance of thirty feet from the line of the street on which it fronts and no servants' house shall be erected nearer than thirty feet from South Bellevue Avenue, provided, however, that steps may pro-

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ject over building lines. That no fence shall be erected nearer than the house lines to any street. The grantee, her heirs or assigns, by accepting this deed, expressly contracts with the grantors and with all other purchasers of lots in Snowden Homestead subdivision, that the above limitations and restrictions to the use of the property will be strictly observed, and hereby confers the right upon the executors and trustees above named and assigns and to every owner of a lot in said subdivision to enforce the same by process of law."

In the declaration filed in this case it is averred that, "As an inducement to plaintiff to make the contract, the Snowdens represented and contracted with them that the above limitations and restrictions would be strictly observed and that no purchaser of any lot in said subdivision would be permitted to violate said restrictions and limitations, and that said executors and trustees would enforce the same against any purchaser by process of law." It is then averred that the defendants, Mr. and Mrs. Ashford, purchased a lot near to and adjoining the lot plaintiffs bought from the Snowdens and that their purchase was made on the 1st of November, 1911. It is then averred that the defendants, the Ashfords, entered into a contract with the defendant Brinkley Snowden that the lot they bought should be used for residence purposes for white people only and that no main building should be erected on it the fair cost of which was less than \$5,000.00, and that they agreed that by accepting the deed from Brinkley and J. B. Snowden, trustees, and expressly contracting with them and all other purchasers of lots in the subdivision that said limitations and restrictions of the use of the property would be strictly observed, they thereby conferred the right upon said trustees and their assigns, and every owner of a lot in said subdivision to enforce the

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same by process of law. The declaration then avers that the defendants, the Ashfords, erected an inferior main building on the lot bought by them from the Snowdens, the fair cost of which was much less than \$5,000.00, and was only about \$3,000.00. It is then averred in the declaration that the deed made by the Snowdens to the Ashfords had in it the same limitations and restrictions as was contained in the deed made to plaintiffs by the Snowdens. The declaration further states that plaintiffs had called the attention of the Snowdens to the violation of their contract by the Ashfords and called upon the trustees to enforce it as against them as they had bound themselves and contracted to do, but the said Snowdens ignored their demands and refused and failed to take any steps against the Ashfords and compel them to conform to the limitations and restrictions in their deed. It was then averred that by reason of the failure of the Ashfords to conform to such limitations and restrictions, and by reason of the failure of the Snowdens to compel them to do so, plaintiffs had suffered an injury to their lot to the extent of \$3,000.00, and for such damage they sought a recovery in this suit, it being averred that the character of house built by the Ashfords had reduced the value of the property bought by plaintiffs from the Snowdens to that extent.

The defendants, the Ashfords, filed separate demurrers setting forth four or five different grounds of demurrer. The Snowdens likewise demurred to the declaration, setting out three grounds thereof, but in the view we take of this case it seems unnecessary to state each of the grounds of demurrer set out in either case. The question has been argued in brief of learned counsel upon the theory that complainant is in the wrong Court, and if they have any rights they can enforce against either or all the defend-

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ants that they must go into a Court of equity to enforce them, and that a Court of law has no jurisdiction to give them a recovery for damages such as are stated in the declaration.

We deem it unnecessary to go into a detailed statement of the law regulating and controlling the rights of parties under such contracts as are set out in this declaration. It has been repeatedly decided in other jurisdictions that leases and deeds to land containing reservations and limitations as to the character of the buildings to be erected and the use to be made of the land after it is sold and conveyed, are valid and binding on the vendee in such cases, and not only on the vendee but on any subsequent purchaser from him with notice of such limitations and restrictions: 3 L. R. A., 532; 36 L. R. A., 373; 83 C. C. A., 58; 3 Pomeroy's Equity Jurisprudence, section 1275. Such limitations and restrictions may be reserved by the vendor in a separate covenant and apart from the deed of conveyance or the lease made by the parties: 3 L. R. A., 582. It seems that where the owner of lands divides them into town lots and makes a deed to the vendees thereof, and in each of the deeds made by him to the respective purchaser embodies limitations and restrictions like those involved in the conveyances by the Snowdens to both plaintiffs and the defendants, any purchaser buying lots in such subdivision has the right to enforce the limitations and restrictions as to all other purchasers of lots in the same subdivision, provided the deeds of such other purchaser contain the same limitations and restrictions and they purchased with knowledge, actual or constructive, of the limitations and restrictions in the other deeds or leases: 3 L. R. A., 582; 21 L. R. A., 391-392; 3 Edwards, N. Y. Chy., 95; 3 Paige, N. Y. Chy., 252. These limitations and restrictions are treated by Professor Pomeroy and charac-

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terized by him as equitable easements, and the authorities that we have examined seem to proceed upon the idea that the rights of each purchaser under such limitations and restrictions in the lots of all other purchasers taking deeds with the same limitations and restrictions in them, are equitable rights and are termed equitable easements, and in every case that we have examined it appears that the purchasers have universally gone into a Court of equity to enforce such rights, and in no case to which our attention has been called or which we have been able to find, has there been an attempt to enforce such rights in a Court of law: 3 Pomeroy, section 1342, and the cases cited, *supra*.

In some jurisdictions these limitations and restrictions are held to be covenants that run with the lands, while in other jurisdictions they are held to be rights that attach to the lands in the hands of whatever persons or assigns they may be conveyed: 3 Edwards, 97-100; 3 Paige, 252. But whether they are covenants that run with the land or merely rights that attach to the lands in favor of each vendee, it is clear from all the authorities that each vendee may enforce such rights against every other vendee acquiring title from the same source and whose title papers contain these limitations and restrictions. In the cases we have examined, and we have investigated more than we have cited, it has been held in all of them that the complainant's right was either to a specific performance of the limitations and restrictions or to a perpetual injunction permanently restraining the violation of such limitations and restrictions. 3 Paige, 242-3, and notes; 1 Pomeroy's Equity, section 460. None of the cases treat these as legal rights but all of them deal with them as equitable rights to be enforced only in and by a Court of equity. As we have said, we have found no case where such rights

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were enforced in a Court of law. Nor has learned counsel for plaintiff cited us to any case where such Court has taken jurisdiction to grant the relief sought in this suit. If the rights reserved in such deeds are equitable rights, or as Professor Pomeroy designates them, equitable easements, then it seems clear that no Court except that of a Court of Chancery can have jurisdiction to enforce such rights.

We have reached the conclusion that the rights reserved by the Snowdens in these deeds to plaintiffs and the defendants, the Ashfords, are equitable rights and that whether they are covenants running with the lands or not, they are such rights as attach to the lots of Ashford as may be enforced by plaintiffs in a Court of equity, either by compelling the Ashfords to build their houses in conformity to the limitations and restrictions, or by enjoining them from violating such limitations and restrictions. We have reached the further conclusion that a Court of law has no jurisdiction to grant the relief sought in and by this suit and that plaintiffs' remedy is in a Court of Chancery. For these reasons the judgment of the lower Court is affirmed.

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THOMAS MOORE v. G. G. BENSON ET AL.

Writ of certiorari denied by Supreme Court, 1915.

1. **ILLEGAL CONTRACTS.** *Contract by layman to aid in procuring pardon.*

A contract whereby parties who are not lawyers agree to exert influence with the governor and pardoning board to secure the pardon of a son of the promissor is void as against public policy.

2. **SAME.** *Contracts which obligate parties to exert improper influences on others.*

A contract whereby parties agree to influence witnesses to misrepresent or retract their testimony, to the end that a pardon shall be obtained, is illegal.

3. **SAME.** *Rescission and cancellation.*

In such case the promissor who has been imposed upon or who has been taken advantage of in his distress and anxiety, may recede from such contract, and have the same cancelled and a mortgage made to secure the obligation declared void and removed as a cloud.

4. **IMPROVEMENTS.** *Right to by party who is in as sub-vendee.*

A party who is not able to defend against the demand of the rightful owners for possession, and who is yet in a manner innocent, is entitled to re-imbursement for improvements which he has placed upon the land; but this right is limited to the permanent enhancement of the value of the land, and is not governed by the cost of the improvements.

FROM DAVIDSON COUNTY.

Appeal from the Chancery Court of Davidson County.
JOHN ALLISON, Chancellor.

Moore v. Benson.

R. E. BLAKE and CHARLES GILBERT for Complainant.

RICHARD WEST for Defendants.

MR. JUSTICE MOORE delivered the opinion of the Court.

THE legal question involved in this suit is whether a contract between complainant and the defendants to secure from the Governor of Tennessee a pardon of complainant's son in consideration of his conveying to defendants some lots he owned in North Nashville, is contrary to public policy void, or is such contract binding upon the parties to it.

It appears that complainant's son had been convicted of the crime of rape upon a young girl, in the Criminal Court of Davidson County, and sentenced to be hung, and afterwards his sentence was commuted to life imprisonment in the penitentiary. After being in prison some time, just how long the record is silent, and about the 15th of November, 1907, the complainant asked the defendant, Benson, to secure a pardon of his son from the then Governor of the State. Benson being an old man, advised complainant to employ the defendant, Crawley, to aid him in securing the pardon. After some negotiations between Benson and Crawley on the one side, and complainant on the other, it was finally agreed between them that they would go to work in their own way to secure a pardon for complainant's son. Defendant Benson insists that he agreed to make this effort simply because he thought it a case deserving such effort, and made the effort out of feelings of humanity, and with a desire and purpose to secure the pardon because of the mental condition of the boy, and did not agree to receive any compensation for his labor, and did not demand any money payment for what he did. He admits that he induced complainant to employ the de-

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defendant, Crawley, to do the work, get up the necessary papers, petitions and proof needed to present to the Pardoning Board and the Governor, and that, in consideration of Crawley's labors in this respect, complainant conveyed to him, Benson, one lot, and to the defendant, Crawley, the other lot involved in this suit. He says that the conveyance of one of the lots was made to him as security for money that he was to advance while they were trying to get the pardon, which was necessary to be expended in these efforts. It is clear from this record that defendant, Crawley, undertook to secure a pardon from the Governor for complainant's son in consideration of his conveying the two lots in question, one to defendant Benson for his benefit, and the other to himself in fee. Complainant's theory and statement is that they not only agreed to try to get the pardon for his son, but to take him before the Governor so he could explain the transaction to him, and also to employ Mr. Baxter Smith, an old and respectable attorney in Nashville, to assist in obtaining the pardon. Complainant charges in his bill that defendants did not employ Mr. Smith nor take him before the Governor to make his explanations, and in fact did little, if anything, to secure a pardon for his son. He insists that he conveyed the lots as we have stated, in payment of services they both rendered, or were to render, in obtaining a pardon for his boy, and he prays that these conveyances be set aside and the title to his lots reinvested in him for three reasons. It is insisted the contract was contrary to public policy, and void; second, it is insisted that defendants did not obtain a pardon for his son, and in fact made but little efforts to secure one, and for that reason the consideration for the conveyances has failed. He insists further that he was, at the time, a very ignorant old negro man, that he could neither read nor write, had no

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knowledge or experience in matters of this kind, and did not know how to proceed or what to do to obtain a pardon for his son; that having known the defendant Benson for a great many years, and having done much work for him during that time, he had always gone to him in his troubles for advice, and that he had unlimited confidence in him, and was willing to do whatever Dr. Benson advised him to do. In this matter he insists that defendants took advantage of his confidence in Dr. Benson, and imposed upon him to the extent of getting his two lots for practically nothing, and for these reasons he files this bill seeking to have the conveyances both set aside and the title to the property placed back in him.

The Chancellor dismissed his bill and refused him any relief. From that decree he has appealed to this Court, and insists that the Chancellor was in error in refusing to grant him the relief asked in his bill, and that he is entitled to be granted the relief prayed for therein.

This record shows, as one of the witnesses testified, that complainant is an old negro man, past sixty years old, "Densely ignorant," and the witness says, "Intensely honest," and that he is a hard working, industrious negro man, and confided greatly in the defendant Benson, believing he was his friend, and would take care of his interest and secure a pardon for his son.

According to Benson's testimony, the negro boy was evidently very weak minded, if not altogether an imbecile. At least that was what Dr. Benson thought of him, and thinking this was his mental condition, he interested himself in securing a commutation of the sentence imposed upon the boy from death to imprisonment for life. This he secured from Governor Taylor during his last term as Governor of Tennessee. Some years after this commutation, complainant wanted to get a pardon for his son,

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and believing that Dr. Benson could secure it, applied to him to help get the pardon. Benson agreed to do what he could for the old man, but we do not think he intended or expected complainant to pay him for his services in this respect. On the contrary, we are of the opinion that whatever the doctor agreed to do, and did do, was from a humanitarian standpoint, and because he believed the negro boy was so near an imbecile as to be incapable of committing a crime, and for that reason should be pardoned by the Governor. When approached by complainant to get a pardon for his son, Dr. Benson informed him that he was old and could not do much running around, and advised him to employ the defendant Crawley to do the active work, and brought complainant and Crawley together, when they made an agreement that complainant would convey to Crawley the two lots involved in this suit in payment of his services in trying to secure the pardon. Thereupon, complainant made a deed to one of the lots to Dr. Benson, and of the other to the defendant Crawley. Complainant insists these lots were worth at that time between \$500.00 and \$650.00, while defendants insists that they valued them at the date of these conveyances, at only \$130.00. There is proof in the record, made by a disinterested real estate man, that they were worth from \$550.00 to \$600.00, and we are inclined to believe that their real value was somewhere about that amount.

If either of these men ever performed any service for complainant before the Pardoning Board, or before the Governor, in trying to secure a pardon, this record fails to show it. The deposition of one of the prison commissioners was taken, and he testified as to the manner and method of making applications for pardon, and how his Board dealt with and disposed of such application. He states he has no recollection of defendant Crawley having

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ever appeared before the Board, and that there is no record so far as he knows, of any application for pardon ever having been made to his Board. It is admitted by defendants that no application was ever made to the Governor, and that it was not mentioned to him, except defendant Crawley states that he casually spoke to the Governor about it on the streets or in the capitol at one time. They failed to produce any papers, petitions or other records to show that they ever did anything to secure the pardon of complainant's son, and while it may be true, and doubtless is true, that defendant Benson at one time went before the Pardoning Board in the interest of complainant's son, it does not appear what he did at that time or what papers he took with him and presented to the Board, if any. Defendants claim that they had circulated petitions for persons to sign, asking the Governor to pardon this boy, but how many petitions were circulated, or whether they were ever signed, or how many signatures were obtained, the record does not show. It does appear that the defendant Crawley did but very little to secure a pardon for this unfortunate negro boy. He claims to have made one trip to Cheatham County, which does not appear to have been necessary, and he accomplished nothing by this trip. After they had investigated the record of the trial of the boy, they reached the conclusion that it was a "bloody record", and Crawley says that he found it was a hopeless case. After learning it was a bloody record, and a hopeless case, he went to St. Louis, Mo., to see the girl on whose person the crime was committed. It seems to have been his idea to get a statement from her at variance with her testimony in Court. He seems to have felt that that was the only chance to get a pardon. It seems that defendants both went about securing this pardon in a secret, quiet way, and evidently did not want the

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prosecutor or those interested in the prosecution to know anything about their efforts to secure a pardon, doubtless feeling that if the prosecutor learned of their efforts he would make counter-efforts to prevent their accomplishing anything. When Mr. Crawley went to St. Louis, he was unable to see the girl, because the man with whom she was living refused to let him see her or to allow her to make a statement. Just what statement Crawley expected to get from this girl he does not say, but evidently he had in mind to get a statement from her different from that she had made in Court. He must have so intended and desired, because he was bound to know if she made the same statement to him that she made in Court, that it would be worthless in the application for pardon. So that, we think it clear that he intended to try to induce her in some way or other, to modify and perhaps materially change her testimony from that given by her in Court, and in this way secure the boy's pardon. Finding he could not obtain access to the girl in St. Louis, he states that he employed a policeman in that city to get a statement from her. He does not say what kind of a statement he desired the policeman to get, but it evidently was a statement materially differing from the one the girl had made on oath during the trial of this negro boy. He claims to have made two trips to St. Louis for this purpose, but accomplished nothing on either trip. This is the sum and substance of all Mr. Crawley testified he did in the way of securing a pardon for this boy.

In 6th Volume of Ruling Case Law, 741, the principle is stated that, "All agreements that tend to introduce personal influence and solicitation as elements in influencing action by any department of the government, are against public policy, as contrary to sound morals and tending to inefficiency in the public service. Although a

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contract to pay for professional services in fairly placing the facts of a case before the officials of a government is valid, the promise to pay money in consideration of the employment of solicitation to influence or secure official action in any form whatever, other than by the use of open and legitimate evidence or argument, is opposed to public policy." On page 751 of this Volume, the author says: "Another class of contracts in variance to which the Courts are agreed that they are contrary to public policy, are contracts which have a tendency to obstruct or interfere with the administration of justice." On pages 766 and 767 of this Volume, in speaking of contracts or agreements to obtain pardons, it is said: "There is, however, some difference of opinion as to the legality of a contract to pay a third person for attempting to procure a pardon for a convict. Much would no doubt depend on the nature of the services to be rendered. . . . Such a contract, if the parties contemplated only a resort to legal and proper measures, is free from any just exceptions and binding upon the parties." It is said that it is lawful to employ an attorney at law to examine the case upon which conviction was based, and see if it is of such a nature as to justify the exercise of the pardoning power, and such an attorney may make such investigations as are necessary to discover the facts bearing upon the question of guilt, facts not discoverable at the time of the trial, and that the attention of the prosecution and the judges who tried the cause may then be directed to such newly-discovered evidence or to any circumstance, and their recommendation for such pardon may be sought, and the services in these respects the attorney may recover the sum agreed to be paid. It seems, however, that some Courts have held void a contract founded upon a promise to procure signatures and obtain a pardon from the Governor for one convicted

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of a criminal offense and sentenced to imprisonment, and that such agreements cannot be enforced, the Courts holding in such cases that where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously and not for money, and the doing of an act should proceed from pure motives, and not from pecuniary ones. The author of this article in *Ruling Case Law*, says: "This conclusion is designed to protect the exercise of the pardoning power from abuse through the intervention of designing persons. Although in the particular instance no improper method may have been resorted to, the public interest in such questions requires that the principle should be enforced in all cases." It is then said: "It may sometimes between the parties, be unjust to claimant who has rendered valuable service to another in distress, but rules of law founded on public policy and the safety of society will not be set aside to sustain such individual demand."

The Courts of Pennsylvania have placed themselves on record in favor of holding all such contracts void as against public policy. In *Hatzfield v. Gulden*, 7 Watts (Pa.), 152, 32 Am. Dec., 750, it appears that Hatzfield was in the penitentiary and asked Gulden to obtain a pardon for him, and in order to do so to use fair and honorable means to obtain it, and for doing this Hatzfield promised to pay \$1,000.00 to Gulden. He was pardoned, but refused to pay Gulden the money, and he brought suit to recover it. The Court said: "The power to pardon is a constitutional power; to alleviate or remit punishment where perhaps there is a doubt of guilt, or where the offense was committed under circumstances extenuating the crime. The power to pardon may be considered as a part of the penal code of the State; it is as important that it should be free from bias or prejudice as that the trial should be. It was

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not necessary to say whether after the whole transaction is closed, a person who incidentally paid some postage or who under special circumstances carried a petition the signatures to which were spontaneously made, may not receive his actual expenses and daily pay. I would say it must be a very special case, however, to justify this. We do not wish to see advertisements that pardons will be obtained at the lowest price or anything that approaches it, and generally all contracts to change the course of trials, or the effect of trials, whether to obtain the liberation of a prisoner by money to the jailor or to obtain a pardon by the use of money directly or indirectly must be void."

In the old English case of *Norman v. Coleman*, 3 Esp., 353, Lord Eldon said: "Where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously and not for money; the doing of an act of that description should proceed from pure motives, and not pecuniary ones."

In *Marshall v. B. & O. Railroad*, 16 Howard, 314, the Supreme Court of the United States, in dealing with a question of this kind, said: "It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or that is inconsistent with sound morals or with public policy, all of which tend to corrupt or contaminate by improper influences the integrity of our social or political institutions. The pardoning power committed to the executive should be exercised as free from any improper bias or influence as the trial of the convict before the Court; consequently, the law will not enforce a contract to pay money for soliciting petitions or using influence to obtain pardons."

In *Hatzfield v. Gulden*, *supra*, the Court said: "It must be the duties of the Courts to take a firm stand and discountenance as against public policy any and all contracts

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which may tend to introduce the offense prohibited. Whenever similar cases have been brought to the attention of the Court they will receive the same decision. Secrecy as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent, and where the agent contracts to use secret influences, or voluntarily without contract with this principle uses such means, he cannot have the assistance of the Court to recover compensation."

The Supreme Court of Maryland, in *Wildley v. Collier*, 7 Md., 273, 61 Am. Dec., 346, when passing upon a contract of the nature herein involved, said: "Courts of justice are generally open to suitors for the recovery of just claims, but considerations of public policy are often deemed paramount to private rights, and where they are opposed, the latter must yield. There is no doctrine better settled than that agreements to obtain executive clemency by means of pardon or otherwise, cannot be enforced. The reasons are obvious. They are designed to protect the exercise of this power from abuse through the intervention of designing persons, and although in the particular instance no improper influences may have been resorted to, the public interest in such questions requires that the principles should be enforced in all cases. It may sometimes as between the parties, be unjust to a claimant who has rendered valuable services to another in his distress, but the rules of law founded on public policy and safety of society will not be set aside to sustain such individual demands.

We have not been cited to any case by learned counsel for defendants that upholds and sustains an agreement or contract to obtain a pardon for a money consideration. The case of *Railway Co. v. Railway Co.*, decided by the Supreme Court of Wisconsin and reported in 6 L. R. A.

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(O. S.), 601, is in line, in principle, though the facts are somewhat different, with the rule as stated in Ruling Case Law.

The case of *Spaulding v. Ewing*, decided by the Supreme Court of Pennsylvania, and reported in 16 L. R. A. (O. S.), 727, is where that Court held void as against public policy a contract to give a certain percentage of a claim against the government for services in collecting it, where the services performed consisted largely in procuring from Congress legislation under which the postoffice department was required to pay the claim. The principle decided in that case is the same as that invoked in the case now being considered. The same principle was announced in the case of *Houlton v. Dunn*, by the Supreme Court of Minnesota, and reported in 30 L. R. A. (O. S.), 737. In *Houlton v. Nichal*, the Supreme Court of Wisconsin, as reported in 33 L. R. A., 166, decided the same principle as applicable to payment for service in procuring legislation to be passed by the Congress of the United States. In the course of the opinion Mr. Justice Marshall said: "All agreements which tend to introduce personal influence and solicitation as elements in procuring and influencing legislative action, or action by any department of the government, are contrary to sound morals, lead to inefficiency in the public service and come under the condemnation of the rule here under consideration," that is, the rule that holds void as against public policy all agreements which, by their terms or by necessary implication stipulate corrupt action or personal solicitation in the nature of lobbying, or tend directly to such results.

There have been but few cases before the Courts involving the validity of contracts or agreements to secure pardons for one in prison. We think it might be safely said that an attorney at law may make a legal contract

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with a convict to examine the record upon which he was convicted and such newly-discovered evidence as it is claimed has been found, and to present the same to the prosecuting officer and judge, and seek their recommendation for pardons. We think such attorney may legally contract to present an application for pardon to the Pardoning Powers, whether to the Governor of the State or a Board of Pardon, and to make an oral or written argument before such power and make contract for compensation for performing such services.

But in this case there is no pretense that Dr. Benson or Mr. Crawley are attorneys at law, or that the services they contracted to perform were to be performed by them as such an attorney. One was a doctor retired from the practice, and the other was an officer of the State of Tennessee, and also a private detective. While it is not so stated by Dr. Benson, it seems evident that he thought that Crawley, on account of his official position and his business as a private detective, would be more efficient in preparing the record to be presented to the pardoning powers, and more efficient and influential in presenting the application to the Pardoning Board, and it was for these reasons, as it appears to us, that Crawley was employed and for which services these lots were conveyed. There was no humanitarian idea involved in Crawley's employment. It was a purely selfish, pecuniary purpose with him, and nothing else actuated him to make this contract with complainant. The fact that these proceedings were to be secret, and that these defendants so advised complainant, is a strong circumstance militating against the propriety of this application. Secrecy no doubt was necessary in order to keep the friends of the prosecution from learning the efforts that were being put forward to secure a pardon for this negro boy. If such application was made, or intended to

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be made, the prosecution had a right to know of it so as to be present to offer objections and to show reasons why the pardon should not be granted. Again, we think it clear from Crawley's determined purpose to get a statement from the victim of the crime then in St. Louis, that it was his desire to have her materially, and perhaps radically change her evidence so as to make it appear to the pardoning power that her testimony was not what it appeared to be at the trial of the cause, and thereby impose upon such power and secure the pardon. Such means was not only unlawful but highly reprehensible in that, their object was to induce the girl to admit she had perjured herself at the trial.

This Court is not ready to make a decision which carries with it a justification and endorsement of the means attempted by this man Crawley to obtain this pardon. We think that the contract between complainant and these defendants whereby they were to secure a pardon for his son for a conveyance of these lots, one to defendant Benson and the other to defendant Crawley, was clearly void as against public policy and should be so held by this or any other Court. But, it is said that complainant is as much in fault as the defendants are, that is, that he was and is a party to the illegal contract that violated public policy, and does not for that reason come into Court with clean hands, and, hence, is not entitled to the relief asked in his bill. It is insisted that in such case, where the parties are in part delicto, the Courts will grant neither any relief from such contract, but will leave them where it found them.

Complainant's learned counsel, admitting the existence and justice of such rule, denies that he is equally at fault with the defendants. He insists that this is an illiterate, densely ignorant negro, who could neither read nor write,

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was in great distress on account of the imprisonment of his son, and being anxious for his release and having full and complete confidence in Dr. Benson, he did not know, and it was impossible for him to know that the contract was illegal and contrary to public policy, and for these reasons the parties were not on an equal footing. As stated, Dr. Benson was a learned, retired physician, who had acquired considerable fortune by the practice of his profession and reached that age when further activity in that line was unnecessary. It is said that Crawley was an officer of the State, a shrewd, scheming, cunning detective, and that they took advantage of the old negro's dense ignorance and want of knowledge of the methods necessary to secure a pardon, and required the conveyance to them of all the property he owned to pay them for their services in the matter.

It is said in *Life Insurance Co. v. Merchants' Life Insurance Co.*, 11 Humph., 14: "If a party acting under circumstances of necessity or hardship or imposition or great inequality of conditions, enters into a contract in violation of a rule of public policy intended for his advantage and protection, it is to be understood, that although he is in *delicto*, he is not in *pari delicto*, and in such case he will be entitled to recover back what he may have paid to the other party or he may have his contract canceled, as the case may require."

We think this old negro man comes within the facts stated by Mr. Justice Totten in the case just cited. He was acting under circumstances of great necessity. He desired the freedom of his son and had no means of securing it except to transfer his all to these men in payment of their services. There was a great inequality in the conditions of the complainant and of these defendants, and it was easy for them to obtain from him what has proved

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to be a very hard bargain to him. It seems that without any hesitation or reluctance, the old darkey made the conveyances required by defendants, and thus forever parted with all the landed property he owned, so far as this record discloses, in the hope and expectation of thereby securing a pardon for his son. In such case, while he was at fault in so contracting, he was not equally at fault with the defendants, and for that reason we think he is entitled to the relief asked in his bill.

Defendants claim they have placed some improvements on this property since the deeds were made to them. It is not certain whether they made the improvements on it, or whether Dungar made these improvements after the conveyances were made to him. From Dungar's testimony it seems that he made all the improvements on the property. He expresses a perfect willingness to give up any claim he has on it in favor of complainant. Defendant Crawley claims to have put a barn or stable on one piece of the property, and complainant expresses a willingness that, if the Court will give him back his lots, Crawley may remove this barn from the lot on which it was built.

The decree of the Chancellor must be reversed, and a decree will be entered here declaring this entire transaction void because it is contrary to public policy, and a decree will be entered divesting the title to these two lots out of the defendant Dungar and the defendants Benson and Crawley, and vesting the title in the complainant Moore.

If the defendant Crawley placed any permanent improvements on either of these lots, which have permanently enhanced their value after they were conveyed to him and before his conveyance to Dungar, then he is entitled to be repaid the value of such improvements as permanently enhanced their value. But he will be permitted to remove

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the barn from the lot on which it was built, and will not be entitled to any compensation for its value.

The cause will be remanded to the Chancery Court of Davidson County to the end that a reference be made to the Clerk and Master of that Court, to take proof and report what improvements were placed on either or both of these lots by the defendants Benson and Crawley, or either of them, after the date of the deed made by complainant conveying them to the defendants, or either of them, and before such lot or lots were conveyed to the defendant Dungar. The Master will then inquire whether or not such improvements permanently enhanced the value of such lot or lots, and if so the amount of such enhanced value, and such amount, when confirmed by the Chancellor, will be declared a lien on the lot on which such improvements were made. But it must not be understood that defendants are entitled to the value of improvements made whether they enhanced the value of the realty or not. They are only entitled to the value of improvements that permanently enhanced the value of the lots or lot.

The defendants will pay the costs of this cause, as well as the cost of the appeal to this Court, and a decree will be so accordingly entered.

Carter v. Brady.

**MARY P. CARTER ET ALS. V. CHILDRRESS POINTER BRADY
ET AL.**

Affirmed by Supreme Court, 1915.

1. WILLS. *Ascertainment of intention. Propriety of disposition not a question.*

It is the duty of a Court to ascertain first the intention of a testator, and if it be lawful to give it effect notwithstanding it may have been unjust and unwise.

2. SAME. *Class doctrine. Contingent remainder. Disposition at termination of life estate.*

A testator by provision in his will gave an interest in certain property to a daughter to her sole use during her natural life and then to her child or children if she have any; if not, then to the surviving sisters and the child or children or deceased's sisters. Held that this provision made necessary the application of the class doctrine; that the remainders outstanding and preceding the death of the daughter were contingent; and that those only of the named class who were in existence at the death of the daughter would take; and that this would exclude grandchildren; so that there being in existence only two persons who filled the description, they took notwithstanding living issue of others who were prior thereto of the same class with those who were adjudged to take.

3. CLASS DOCTRINE. *When it arises.*

In every case where a time of distribution or vesting is fixed beyond the death of the testator and the number of individuals to whom the gift then to take effect is capable of increase or diminution by death, the class doctrine applies.

FROM DAVIDSON COUNTY.

Appeal from the Chancery Court of Davidson County.
JAS. B. NEWMAN, Chancellor.

Carter v. Brady.

KEEBLE & SEAY and A. W. STOCKELL for Appellants.

CLARENCE T. BOYD for Appellees.

MR. JUSTICE MOORE delivered the opinion of the Court.

THE bill in this case was filed to have construed certain parts of the will of John H. Pointer, deceased, which was executed on the 30th of July, 1866, and to which was attached a codicil made on the 19th of August, 1866. The record does not show the date of the death of Mr. Pointer, but his will was probated at the October term of the County Court of Giles County, in 1866, which indicates that he died some time between the date of the codicil and the probate of his will. At his death, he left surviving him a widow, one granddaughter, the complainant, Mary P. Carter, and three daughters, Amanda Childress, then the wife of Marion Childress; Martha J. Ewing, then the wife of Hugh F. Ewing, and Harriett E. Pointer, then an unmarried daughter. The portions of said will calling for construction in this case are as follows:

“Item Four. The residue of my estate, (exclusive of the Pillow debt,) I direct shall be reasonably used and expended for the support of my family for the two years after my death, unless the Pillow debt should sooner than that be collected, and at the end of two years from my death, I desire my estate then remaining divided as follows, to-wit: I give to Mary P. Carter, my granddaughter, one twelfth, and to my wife, Martha A. Pointer, and to my daughters, Amanda Childress, Martha J. Ewing, wife of Hugh F. Ewing, and to Harriett E. Pointer, each one full share, the same to be equally divided among them, after the said Mary P. Carter shall receive one twelfth—provided, nevertheless, that if either of my said daughters should, before the distribution, be dead, said child or chil-

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dren of said daughter shall take the share of the mother—and if my wife shall before such time die—then the share intended for her shall be ratably divided among my said surviving children, and my said granddaughter, Mary P. Carter—and if either of my said daughters or my granddaughter, Mary P. Carter, should leave no child or children to take the benefit of the bequest under this item, then the share intended for such daughter shall be ratably divided among the other daughters and said grandchild, all subject to the limitations hereinafter to be set forth.

“Item Five. It is my will and desire, and I do hereby direct, that in paying over legacies and bequests under this will, that my executor hereinafter named, shall convey one-half of the legacies and bequests in favor of my daughters to the sole and separate use of the legatee or devisee to be used by her during life, and at the death of such legatee or devisee, the said one-half to be paid or given to the children of such legatee or devisee, if such survives the parent, and if no child or children survive the parent, the said one-half of the legacy or bequest shall belong to the surviving sisters or sister, and to the child or children of deceased sisters, the other half of the legacy and bequest to be paid over absolutely without limitations or restrictions, and the first named half given for life shall be free from the debts, contracts, liabilities of the husbands of such legatees or devisees; and I further direct that the devises and bequests herein contained, in favor of Mary P. Carter, shall be to her for and during her natural life, free from the debts and contracts of any husband she may have, and for her sole and separate use, and at her death, the same to belong to her children, should any such survive her, and if not, then it shall belong to my three daughters aforesaid, her father, the said Daniel C. Carter shall in no event control or receive any part of this bequest.

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"Item Six. My executors hereinafter named, are authorized to sell any property when by the terms of this will it should be distributed, and they are likewise authorized and empowered to make any compromise and settlement of any unsettled or litigated business connected with my estate, which in the exercise of a sound discretion they believe is demanded, for the best interest of my estate, and if the Pillow debt, or any considerable portion of it, shall be collected before the expiration of two years after my death, then such amount, as well as the balance of my estate, shall then be distributed and not delayed to the end of the two years, but of course with the limitations as before provided, except that the period of distribution shall thereby be changed."

No construction is sought in the bill of the seventh item of the will, and for that reason it is not copied herein. In the last item of his will, the testator appoints his son-in-law, Marion Childress, and John C. Brown executors of the will without bond. On the 19th of August, after the date of the will, a codicil was executed by Mr. Pointer, which modified and changed the legacy named in the second item, to the youngest daughter Harriet E. Pointer; but as this codicil is not involved in this case, it is not necessary to further notice it.

His daughter, Martha J. Ewing, mentioned in the fourth item of the will and referred to as one of his daughters in the fifth item, died 17th of December, 1868, a little more than two years after the will was probated. She left no children, or descendants of children, surviving her at her death. It is apparent from the record that Amanda Childress survived the testator and was living in 1885, but just when she died we are unable to find in the record. She had nine children during her married life, four of whom died without issue before her death, and five of whom sur-

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vived her. These five children lived to maturity, and were as follows: Sarah P. Childress, Martha A. Childress, Lavinia A. Childress, Marion F. Childress and Demarcus L. Childress. There were only two of these five children living at the time this bill was filed, to wit: Complainants Marion F. Childress and Demarcus L. Childress. Sarah B. Childress married one Mark C. Brady, but she died many years ago, leaving surviving her two sons, the defendants Childress Pointer Brady and John Brady, both of whom were more than twenty years old when the bill was filed. Another daughter, to wit, Martha A. Childress, married one T. F. Lindsay, and died many years ago, leaving the following children surviving her: the defendants Nannie Lindsay Howell, Sadie Lindsay Kelso, and Mark C. Lindsay, all of whom are more than twenty-one years old. The other and remaining daughter of Amanda Childress, to wit, Lavinia A. Childress, married one F. G. Buford, and died many years ago, leaving surviving her only one child, to wit: Amanda Buford, the wife of J. W. Major, and she is now more than twenty-one years old and is a party defendant to this suit. The daughter Harriet P. Pointer, afterwards married one Mr. Burrus, and died 19th of April, 1913, leaving no children surviving her, or descendants of any deceased children. Her husband died some time before she did. At and before her death, to wit, on the 21st of July, 1909, the daughter, Harriet P. Burris, called in this record Hattie P. Burrus, made and published her last will and testament, and after giving certain specific bequests, in the fourth item thereof, she gives and bequeathes all other property of which she may die possessed, to the complainant Nannie P. Carter, and to the defendant Nannie Lindsay Howell, to be equally divided between them, to wit, her Arkansas land, notes or money.

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Sometime in 1885, or earlier, the executors of the will filed a bill in the Chancery Court of Giles County, "For the construction of the will and settlement of John H. Pointer, deceased," and for a partition or division of the estate of John H. Pointer among and between his widow and children then alive, Mrs. Ewing having died some years before that date. In that proceeding the Chancery Court in passing upon the fifth item of the will, held and decreed that the daughter, Mrs. Burrus, who was then married to F. R. Burrus, and Amanda Childress, the widow of Marion Childress, who at that time was dead, had the right, under this item of the will, to sell in fee one-half of the lands in Arkansas conveyed by General Pillow to the executors in payment of his debt to the estate, and inasmuch as one J. W. Clopton had agreed to buy the one-half interest in said lands, the Chancery Court authorized a conveyance to be made by these two daughters to said Clopton of such interest in said lands in Arkansas on certain considerations stated in an agreement filed in said Court and made a part of its decree. It appears that such conveyance was made by these two daughters, together with the husband of Mrs. Burrus, to Mr. Clopton, and he became the owner thereafter of such interest in these Arkansas lands. The remaining undivided interest of 11/96 in value of said Arkansas lands, was vested by the decree of the Court in these two daughters, and an undivided 8/96 in value was vested in complainant, Mary P. Carter, "According to the terms of the will of John H. Pointer, to the sole and separate use of each of said legatees or devisees, to be used by her during life and at her death to go to the children of such legatee or devisee if such survived the parent and if no child or children survived such parent, then the legacy or devise shall belong to the surviving sister or sisters and to the child or children of the deceased sister,

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the said legacies or devises to be free from the debts or control of any husband either of said legatees or devisees may have, and the share of said Mary P. Carter, upon her death without child or children shall belong to said Amanda Childress and Hattie P. Burrus, according to the terms of the will of John H. Pointer," etc.

The question before this Court for its determination is what estate Hattie P. Burrus took under the will of her father, John H. Pointer, whether she took the fee in such estate, including the Arkansas lands, or only a life estate. So far as the will of Mrs. Burrus is concerned, we understand the Arkansas lands mentioned and described in the bill as belonging to her are the only property of which she was possessed at her death that came to her under her father's will, and we are to determine whether she had a life estate in such lands, or a fee simple title therein, or a defeasible fee determinable upon her death without children or representatives of deceased children. Complainants state in their bill that "The said Hattie P. Burrus was vested only with a life estate in said property, and therefore no interest in said property passed to complainant Mary P. Carter or to defendant Nannie Lindsay Howell by virtue of the will of said Hattie P. Burrus. But complainant is advised that the remainder interest or fee estate in such property held by the said Hattie P. Burrus for her life, passed to those who take the remainder interest by virtue of the will of said John H. Pointer, deceased." Complainants insist that, as Mrs. Childress, the sister of Mrs. Burrus, was dead at the time the latter died, the fee in the Arkansas lands at the falling in of the life estate of Mrs. Burrus, passed to the then living children of Mrs. Amanda Childress, to wit, the complainant Marion F. Childress and Demarcus L. Childress, and that they took the entire estate in said lands at the death of their aunt, Mrs. Burrus,

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and that nothing passed under her will to complainant, Miss Carter, or to defendant, Mrs. Howell.

Since Mrs. Martha Ewing died before Mrs. Hattie P. Burrus did, and left no children or descendants of children surviving her, and since Mrs. Amanda Childress died prior to the death of Mrs. Burrus, leaving only the complainants, D. L. Childress and M. F. Childress, her surviving children, they insist that, under the will of John H. Pointer, these two surviving children of Mrs. Childress take the remainder interest in the Arkansas lands, at the death of Mrs. Burrus, to the exclusion of the children of any deceased children of Mrs. Amanda Childress. Or, in other words, the limitations in the fifth item of the will, of the half given to Mrs. Burrus for and during life and at her death to her children, if such survived her, and if none survived her, then said legacy or bequest to belong to the surviving sister or sisters and to the child or children of deceased sisters, limits such remainder in the event of the death of both sisters, to the children of either sister living at the time of the death of Mrs. Burrus, and such limitation being to such children as a class, and those of the class living at the time of the death of Mrs. Burrus, take the whole estate in remainder to the exclusion of the descendants of the deceased children of either child.

The defendants controvert this construction of the will, and it must not be forgotten that only Mrs. Nannie Lindsay Howell, Mrs. Sadie Landsay Kelso and Mark C. Lindsay answer complainants' bill. The other defendants do not, and a judgment *pro confesso* was taken against them. In their answer they seem to concede that Mrs. Burrus took only a life estate to half of the property given to her by the will of her father, John H. Pointer, and it may be said in passing, that in the brief of learned counsel filed for these defendants who answer the bill, it is conceded

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that Mrs. Burrus took only such life estate, but defendants insist, "That the proper and legal construction of said will as to the title of the estate, or interest, so devised to said Hattie P. Burrus, is that the estate or interest vested immediately upon the death of the said John H. Pointer, in his daughter, Hattie P. Burrus, and which, being transmissible by descent, passed under the Statute of Descent and Distribution of this State, to her legal heirs, who are named in the bill the children and grandchildren of her sister, Amanda Childress."

Defendants deny that the class doctrine applies in the construction of the Pointer will, but state in their answer that if the Court should hold that it does apply, under a proper construction of said will, "Then, in this event, the remainder estate going to the said Hattie P. Burrus thereunder would vest in her sister, Amanda Childress, and complainant, Mary P. Carter, at the end of the period of two years after the death of said John H. Pointer, because his said will so fixed the time of division and distribution of that part of his estate going to Mrs. Burrus, and which, under the decisions of Tennessee, was transmissible by descent."

In other words, it is insisted as we understand the language used in the answer, that Mrs. Burrus took a life estate, and the remainder in fee vested in Mrs. Childress at the end of the period of two years after the death of Mr. Pointer, and when Mrs. Burrus died, Mrs. Childress being then dead, this remainder in fee then vested, under the Statute of Descent and Distribution, not only in the then living children of Mrs. Childress, but also in her grandchildren.

In the brief of learned counsel for respondents, after stating the insistence of complainants, the appellees' contention is stated in this way:

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"It is contended by appellees that the proper construction of said will of John H. Pointer, is that his two daughters to-wit: Amanda Childress and Martha J. Ewing, took a vested estate in fee in remainder of this Arkansas property, defeasible upon a child or children born to Harriet E. Burrus before the period of distribution and then living; and Mrs. Martha J. Ewing having died without issue or children, as well as the life tenant, Hattie P. Burrus, the entire remainder estate vested in fee in Mrs. Amanda Childress, which was transmissible by descent to complainants, her two living sons, and defendants, the children of her three daughters *per stirpes*."

It is further insisted in the brief that the class doctrine does not apply in the construction of the will of John H. Pointer in regard to the interest in his estate given to his daughter Harriet E. Pointer, for the reason that the will gives the estate "To Harriet E. Pointer for life and at her death, should she leave no child or children surviving, to her sister Amanda Childress and Martha J. Ewing equally, the testator having specifically named these two sisters," and because he specifically named the two sisters as taking this remainder interest, it is argued that the class doctrine is, in the language of Mr. Justice Neil, disintegrated, and, therefore, is not controlling in the construction of the will.

In the brief it is then said, if this Court should hold that the class doctrine does apply, "Under a proper construction of the will in question, it is respectfully insisted that the determination of who shall constitute the class to take must be made at the period fixed or designated as the time for the distribution to take place," and that period it is argued was fixed in the will as the end of two years after the death of the testator. After stating counsel's reasons for insisting that the two-year period was the time for distribution, and when the estate in remainder became

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vested, the brief then says: "It is respectfully submitted that the class to whom the devise in remainder must go, would be the two daughters, or sisters of Mrs. Burrus, living at the period of distribution so fixed." In the brief it is said that Mrs. Ewing died before this period of distribution took place, but counsel must be in error about that, for the record shows that she died the 17th of December, 1868, while Mr. Pointer must have died before the October term of the County Court, in 1866; and this would make the death of Mrs. Ewing more than two years after the death of Mr. Pointer, which as argued by counsel is the distribution period. If she died at the time stated in the record, then she certainly died after the alleged distribution period—about two months thereafter, and was alive at the date of such distribution period, if the two-years' time was the distribution period when the rights of the parties under the will became fixed.

It appears that the Chancellor did not agree with counsel for either side in the construction of the Pointer will, and held that Mrs. Burrus, under the will, took an absolute estate in fee to the Arkansas lands, and that she could dispose of it in her lifetime in any way she thought proper. Having made her last will, in which she devised it to complainant Mary P. Carter and defendant Nannie Lindsay Howell, they took the property under this will, and that the other parties to the suit had no interest in it of any character. Just how the Chancellor reached that conclusion we have no means of knowing, and counsel for neither complainants nor defendants suggest in their briefs how the Chancellor reached such conclusion. In fact, neither counsel make any reference to the decree of the Chancellor, further than appellants' counsel assigns it as error.

The complainant, Miss Carter, qualified as the executrix of Mrs. Burrus' will, and collected some rents due on

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the Arkansas lands at the death of Mrs. Burrus, and had continued to collect rents therefrom after her death, and one purpose of the bill was to have a construction of the will so that she might know to whom such rents were payable, and the Chancellor decreed that such rents as she collected "during the year 1913, and subsequent years, be held and paid out by the said Mary P. Carter, executrix," etc., in accordance with the terms of the said will of Hattie P. Burrus, as personal property passing under said will.

The complainants excepted to the decree of the Chancellor, and appealed to this Court and assigned his decree as error, while the defendants neither excepted to his decree, nor have they appealed to this Court. So that, the question is here alone on the appeal of complainants and their assignment of error in this Court as to the proper construction of the Pointer will.

In the construction of wills, the cardinal rule is to find what the intention of the testator was, which is to be gathered from the words used, from the context of the will and from the general scope and purpose of the instrument; and when such intention is discovered, it must prevail and have effect. It is not for us to say whether the testator acted wisely or unwisely in the distribution of his property. This is a question with which we have nothing to do. Our business is to find out what his intentions were, and such intentions are gathered from the language he used and the four corners of the will, and when his intention is discovered to declare what they are, and such intentions are then to govern in carrying into effect the provisions of the will of the testator.

We will first consider the fourth item of the will, and in doing so, it is apparent that the testator intended all of the residue of his estate, except the Pillow debt, to be used for a period of two years in the support of his family,

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unless the Pillow debt was collected before the expiration of that period. At the end of two years from his death, it was his desire that the remainder of his property be then divided and allotted in severalty to his wife, three children and granddaughter. Considering in this connection, a provision in the sixth item, which directs whatever is collected on the Pillow debt before the two years expires, it was the intention of the testator to give one-twelfth of the remainder of his estate, including what had been collected on the Pillow debt, to his granddaughter, Mary P. Carter. He intended she should have one-twelfth of such remainder before a division took place between his wife and three daughters. After the grandchild had been allotted her one-twelfth of the remainder, the testator then intended what then remained to be equally divided between his wife and three daughters then living. This item of the will simply provides for a division of his estate among the beneficiaries therein named, at the end of two years from his death, and does not vest in any of them an estate in his property, but does that in the fifth item of the will, as we shall presently see. Under the fourth item the testator provides for an allotment or division of the property at the end of the two-year period, but says nothing about whether the beneficiaries are to hold in fee or for life, or what estate they acquire thereby, leaving the estate they take under the will to be fixed under the fifth item. The proviso in the fourth item was placed there by him to direct how the property should be allotted or divided in the event either his wife or any of his daughters, or granddaughter, should die before this division took place, that is, before the two-year period expired, and so he directs that if either his daughters should, before the two years mentioned, be dead, then the child or children of such daughter is to take the share of the mother so dying.

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To make his meaning and intention clear, it appears that, if the daughter, Martha Ewing, should die between the date of his death and the end of the two-year period, then her child or children were to take the share of their mother. The same is true of either of the other two daughters, and if either of them should die between the date of the death of the testator, and the expiration of the two-year period, then the child or children of such daughter so dying is to have the share of its or their mother. This intention is expressed in the will, but the testator did not expressly provide for the death of the granddaughter, Mary P. Carter, during that period and leaving a child or children, but does make provision in a subsequent part of this item for her dying during that period and leaving no child or children, which provision will be noticed presently.

The testator evidently thought it possible that his wife might die before the division of the property took place, that is, between the date of his death and the end of the two-year period, and he provides in case of her death within such time, that the share intended for her was to be equally divided among his surviving children and granddaughter, Mary P. Carter, that is, the share intended for his wife was, in the event of her death within the two-year period, to be equally divided between the grandchild and the three daughters. The testator thought it might be that one or more of his daughters, or the grandchild, might die during this two-year period, leaving no child or children, and in the event such death should happen it was his intention that the share intended for such daughter dying without children surviving her, or if the granddaughter should die without children surviving her, should be equally divided among the surviving daughters and the grandchild, all as his will expressly declares, subject to the limitations thereafter to be set forth in the next and succeeding item.

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In the fourth item the testator had placed no restrictions or limitations on the property given to his wife or daughters, that is, he had not provided whether they should hold such property as a fee simple estate, or as a life estate, or how they should hold it after the division was made and during the lifetime of the beneficiaries, and, hence, he says at the closing part of such item, that the provisions thereinabove made, are, "All subject to the limitations hereinafter to be set forth," and then proceeds, in the fifth item, to state what such limitations are and what estate he intended the beneficiaries to take under the will.

When we come to consider this fifth item, it appears that it was clearly the intention of the testator that his daughters should hold half of the property given them as an estate in fee, absolutely to dispose of as they desired, and the remaining half of it to be held by each of them for and during their natural lives, and to the sole and separate use of each of them, free from the debts, contracts and liabilities of the husbands of said daughters. No question arises on the construction of this will about that part of the property given to Mrs. Burrus in fee, for she disposed of that part of the Arkansas property given to her in fee, to Mr. Clopton, and held the other half of said property, in which she had only a life estate, until her death. The fifth item directs the executors of the will, in paying over the legacies and bequests thereunder, to "Convey one-half of the legacies and bequests in favor of my daughters to the sold and separate use of the legatee or devisee to be used by her during life," thus creating a technical, separate estate in the legatees or devisees for and during the life of such legatee or devisee. Then follows the provision that "At the death of such legatee or devisee, th said one-half to be paid or given to the children of such legatee or devisee, if such survive the parent." Under this provision it

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is clear that the testator intended, when either of his daughters died, the property given to either of them as a technical, separate estate for life, should pass at the death of such devisee or legatee to her child or children. Manifestly it was his intention to first give a life estate to each of his daughters in half of the property devised or bequeathed to them, and at the death of either of said daughters, the property thus given to her was to pass to her children.

It next occurred to the testator that some one or more of his daughters might die, leaving no child or children surviving her, and that he had, in such event, made no provision as to how the half given for life was then to be disposed of, or to whom it was then to pass; and to meet a contingency of that kind, he next provided in the will that, if either of his daughters died leaving no child or children surviving her, then in such event, the property given for life to such daughter so dying without child or children, "Shall belong to the surviving sister or sisters, and to the child or children of deceased sisters."

To apply the will to Mrs. Burrus' estate, and construe it as if she were the only daughter mentioned in it, the evident meaning and intention of the testator was to give Mrs. Burrus a technical, separate estate for life in half of the property mentioned in the fourth item of the will, and at her death, such half was to go to such of her children as may then survive her; and if at her death she left no child or children surviving her, then the property given to her for life was to go to her surviving sister or sisters, and to the child or children of her deceased sisters. Under this construction, we think Mrs. Burrus took only a life estate in the half of the property given to her as a technical, separate estate. If she had had children at her death, then the property given to her for life would, under the will,

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have passed to such children in fee; but dying without leaving any children surviving her, then the question for our determination is, to whom did such property given to her for life, pass?

At the time Mrs. Burrus died, Mrs. Ewing had long been dead, leaving no child or children surviving her. Mrs. Childress had long been dead, leaving children surviving her. The record fails to show how many children of Mrs. Childress were living at the time she died, but it does show that only two of her children were living at the time of the death of Mrs. Burrus, and they insist, and their counsel ably argues, that, being the only surviving children of Mrs. Childress living at the time of Mrs. Burrus' death, the property devised to the latter passed to them in fee, to the exclusion of the grandchildren of Mrs. Childress; while counsel for defendants insist, and with equal ability argues that, under the will, Mrs. Burrus was only given a life estate in half of the property devised to her, that Mrs. Childress took a vested remainder in fee to such property given to Mrs. Burrus for life, and that, at the death of the latter, the property given Mrs. Burrus for life then passed in fee to the living children of Mrs. Childress, and to her grandchildren *per stirpes*.

The next question for our determination is, what estate did Mrs. Childress take in this half of the property devised to Mrs. Burrus? Did she take a vested remainder estate in fee? or did she take a contingent remainder in fee, or what estate did she take therein? Had she been living when Mrs. Burrus died, Mrs. Ewing being then dead, leaving no children, it is clear that she would have taken the remainder interest in fee. It seems to us, though the question is not free from doubt, that Mrs. Childress only had a contingent remainder interest, during her lifetime, in that part of the land given to Mrs. Burrus for life.

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A contingent remainder is one which is limited to uncertain or dubious person, or which is to take effect on an event or condition which may never happen or be performed, or where the remainder depends on a contingent determination of the preceding estate and it remains uncertain whether the use or estate limited in future will ever vest.

Blackstone divides contingent remainders into two kinds, one, remainders limited to take effect to dubious and uncertain persons, and, second, upon a dubious or uncertain event, as where the person to whom the remainder is limited is in not *esse*.

The will limits the remainder over to take effect at the death of Mrs. Burrus, to her two sisters if then living. These sisters are named in the bill, and were Mrs. Ewing and Mrs. Childress. But their taking depended on Mrs. Burrus dying leaving no children surviving her, that is, to take effect on an event which might not happen or be performed; that is, the death of Mrs. Burrus without children surviving her might not happen. The testator did not know, nor could he know when he executed his will, that Mrs. Burrus would die leaving no children surviving her. If she left children surviving her, it is clear they took the remainder interest, and not Mrs. Burrus' sisters. In that case, it was uncertain whether the use of the estate limited to the sisters, would ever vest. It would not if Mrs. Burrus died leaving children surviving her, but such remainder would vest in such children, and the sisters then living, would take nothing of the estate devised to Mrs. Burrus. So that, we think it clear that neither Mrs. Ewing nor Mrs. Childress, or both of them, ever had a vested remainder in fee in the estate given to Mrs. Burrus for life, but that the most they did have, if they had that, was a contingent remainder, dependent upon Mrs. Burrus dying

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without leaving children surviving her. Mrs. Childress having predeceased Mrs. Burrus, how long before the record fails to disclose, the remainder in the estate given Mrs. Burrus then, at her death, goes to the child or children of such deceased sister, that is, in this case, to the child or children of Mrs. Childress, because she was the only sister that had any child or children living at the time Mrs. Burrus died.

The provision in the will that this remainder "Belong to . . . the child or children of deceased sisters," evidently meant something in the mind of the testator. He evidently did not intend the remainder to vest in the sisters at the time of his death, or at the time the property was divided; for if he did, this provision would not have been placed by him in his will, for he must have known that, if the sisters took a vested remainder in fee, at the death of Mrs. Burrus, it would then pass to the child or children of her deceased sisters. This provision indicates that he did not intend that Mrs. Childress and Mrs. Ewing, or either of them, should take a vested remainder to take effect in possession upon the death of Mrs. Burrus without children surviving her. If he had so intended, the above quoted provision in his will would not have found a place therein, because the testator knew, in such event, that the children of the deceased sisters would take the remainder interest upon the death of Mrs. Burrus without child or children surviving her, without so stating in his will.

In *Fulkerson v. Bullard*, 3 Sneed, 261, the testator provided that his negroes should be hired out for five years, and at the expiration of the five years he directed his executors to divide them equally among all his children, and then provided, "in case of any of my children should die before the time aforesaid, leaving lawful children, said last mentioned children shall take the share of their parents

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in said negroes," and the Supreme Court held that the testator intended the legacy should vest in such of his children as might be living at the time of his death; and in the course of the opinion, Mr. Justice Harris said: "If the legacy had vested at the death of the testator, as complainant insists it did, then if either of his children had died, having a vested right to the legacy, leaving children, they would have been entitled to the legacy of their parent, as distributees, without this clause. But, as we think, because he did not intend the legacy to vest until the expiration of the five years after his death, he thought proper to give it then to such children as he might have living at that time;" and for the very same reason, we think, in this case, the testator did not intend the property devised to Mrs. Burrus for life to vest a remainder in the sisters at his death, and to pass in fee to them at her death, but thought proper to give this property to the child, or children of the sister living at the time Mrs. Burrus died. We are, therefore, of the opinion that all Mrs. Childress or Mrs. Ewing took under the will, was a contingent remainder interest in the property devised to Mrs. Burrus, to take effect in possession upon the latter's dying without child or children surviving her and the sisters both living and before Mrs. Burrus and she having died without such child or children surviving her, the question then arises, who takes this property at her death, when it passes under the class doctrine to the children of Mrs. Childress then living, or does it pass to not only such children then living, but to them and the grandchildren of Mrs. Childress, *per stirpes*.

Where the devise or gift is to a class, and that class is subject to fluctuation, that is, where the class may increase or diminish by deaths or births, and the time of distribution of the property is fixed at a period subsequent to the

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time when the will goes into effect, then, in every such case, the class doctrine applies. 112 Tenn., 472; 126 Tenn., 176, and the numerous cases there cited.

If the devise is to a class, subject to fluctuation, and is to take effect at the death of a life tenant, as was held in 1 Tenn. Chy., 581; 2 Head, 192; 100 Tenn., 391; 2 Tenn. Chy., 190; 7 Yer., 606; 11 Hump., 58; 112 Tenn., 472, and 126 Tenn., 170, then, in such a case, the class doctrine applies and controls, and determines to whom the property passes at the death of the life tenant.

We think this will provides for the final distribution of half of the estate given Mrs. Burrus, at her death, and is then to go to her children, if she has any surviving her, and if none survive her, then to her surviving sister or sisters, and if no sister survive her, then the child or children of her deceased sisters. We think, inasmuch as both of her sisters were dead at the time of her death, and inasmuch as she left no child or children surviving her, and inasmuch as Mrs. Ewing had no children living at the time of Mrs. Burrus' death, and inasmuch as Mrs. Childress was then dead, leaving children alive when Mrs. Burrus died, that the class doctrine does apply, and that the land devised to Mrs. Burrus for life, then passed to the children of Mrs. Childress living at the time of Mrs. Burrus' death, and that Mrs. Childress' grandchildren take no interest therein and have no estate in the property, but that it all passes and vests in the children of Mrs. Childress living at the time of the death of Mrs. Burrus. The will expressly so provides. It makes provision for just such contingency as happened in this case, in that, it is expressly stated that if Mrs. Burrus dies without any children surviving her, the property is then to pass to her sisters; and if the sisters are both dead, and they are in this case, the will then directs that the property shall go to the child or children

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of such of the deceased sisters as are children living at the time of Mrs. Burrus' death. The children mentioned are designated as a class. The class is subject to fluctuation by deaths and births, and had so fluctuated as to be reduced in number from nine that were born to Mrs. Childress, to only two that were living at the time Mrs. Burrus died. We here have two of the elements of the class doctrine, and the remaining element, that is, the distribution period, is fixed at the time Mrs. Burrus died, as was done in the cases cited, *supra*. So that, the conclusion we have reached in the construction of this will is that, at the death of Mrs. Burrus, the remainder in the estate devised to her under the will, passed to the complainants, D. L. Childress and M. F. Childress, and that they are entitled in fee to the Arkansas lands described in the bill, and to such rents and profits as the complainant Mary P. Carter has collected thereon and therefrom, since the date of the death of Mrs. Burrus, and a decree will be entered in this Court in conformity to this opinion, and so adjudging the rights of the parties, decreeing that the other parties to this suit have and took no interest of any kind or character in the Arkansas lands, at the death of Mrs. Burrus, and in the rents and profits arising therefrom since the date of her death.

The defendants will pay one-half of the cost of this cause, and the complainants will pay the remaining half thereof, and a decree will, accordingly, be so entered in this Court.

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SHARP-FLANIGAN-HAMILTON CO. v. CORA TYLER.

Writ of certiorari denied by Supreme Court, 1915.

1. **ASSIGNMENT OF ERROR.** *That evidence preponderates not good.*
An assignment of error that the evidence preponderates against the verdict presents no issue in an Appellate Court in Tennessee.

2. **SAME.** *Assignment for refusal to give special request.*
An assignment that the Court erred in refusing a special request must embody the request which was declined.

3. **SAME.** *Assignments upon the charge of the Court.*
An assignment upon the charge of the Court must contain the words or at least the full substance of the portion criticized.

4. **REPLEVIN.** *Counter replevin. When.*
An owner of personal property whose property has been taken by an officer who effected an entrance into the owner's house in his absence and carried away the property and never attempted to serve any process upon the owner nor give him notice of trial, may himself institute a replevin suit to recover back the property from the officer, notwithstanding the general rule that counter replevin is not permissible.

FROM DAVIDSON COUNTY.

Appeal in error from Circuit Court of Davidson County.
M. H. MEEKS, Judge.

SAM N. HARWOOD for Plaintiff in Error.

W. H. LAWRENCE for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

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THIS suit was commenced before a Justice of the Peace April 6, 1914, by defendant in error to recover from plaintiff in error \$499.99 for invading her premises and taking a lot of furniture she had purchased and paid for from plaintiff in error.

The warrant issued by the Justice of the Peace avers that defendant in error, of legal age and unmarried, purchased a bill of household furniture from plaintiffs in error; that she made the payments thereon, from time to time until March 16, 1914, on which date she finished paying for said goods and received a receipt in full from plaintiffs in error; that afterwards, on April 13, 1914, without warning or notice to her, and while she was absent from her house, plaintiffs in error unlawfully broke into her house, took her goods away, and retained them to her damage, inconvenience, etc., in the sum of \$499.99. The Justice of the Peace, April 9, 1914, rendered a judgment in favor of Cora Tyler against plaintiffs in error for \$200.00 and the costs. From this judgment plaintiffs in error prayed an appeal which was granted to the Circuit Court of the County. They executed an appeal bond in the sum of twenty-five dollars to be void if plaintiffs in error prosecuted their appeal successfully, or in case of failure to comply with and perform the judgment of the Circuit Court.

The case was heard in the Circuit Court before a jury June 14, 1915, and the jury returned a verdict in favor of defendant in error against plaintiffs in error for \$350.00, and on this verdict a judgment was entered against plaintiffs in error for said sum and the cost.

The motion for a new trial was overruled, to which action of the Court exception was taken, and plaintiffs in error prayed an appeal in error to this Court, which was granted upon condition that plaintiffs in error execute and file an appeal bond as required by law.

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Plaintiffs in error were given twenty days from the date of the judgment of the Circuit Court within which to execute and file an appeal bond and a bill of exceptions, and otherwise prepare and perfect their appeal.

Appellants assign in this Court the following errors in substance:

1. No evidence to sustain the verdict of the jury.
2. The verdict is against the preponderance of the evidence.
3. The Court erred in refusing to charge Request No. 1 of appellants.
4. Error in the charge of the Court.

We observe that neither one of these assignments of error can be considered by this Court, except the first, which is, that there is no evidence to sustain the verdict. It has long been settled by this Court and the Supreme Court, that an assignment of error to the effect that the verdict of the jury is against the preponderance of the evidence will not be considered.

The third assignment of error is directed, it is alleged, at the refusal of the Court to charge Request No. 1 of appellants. The request is not embraced in the assignment of error, and the charge of the Court relative thereto is not set out in the assignment of error. Such an assignment of error cannot be considered in this Court.

The fourth assignment of error is simply "error in charge of the Court". It does not set out the charge of the Court, nor any part thereof, to which exception is taken, and no statement of the error committed is contained in the assignment of error.

We cannot consider such an assignment of errors. It is insisted that the trial Judge erred in refusing the application of appellants for a new trial, because,

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1. There is no evidence to support the verdict of a jury against appellants, in that there is no proof in the record showing that appellee had paid to appellants her account in full, and, on the contrary, the evidence in the record shows, beyond dispute, that she had not paid her account in full.

It is further said that she did not produce her receipt which she had in her possession.

In the second place it is insisted, under this supplemental assignment of error that there is no evidence to sustain the verdict of the jury against appellants, and that the receipt which was admitted in evidence and submitted to the jury, under the erroneous instruction of the Court, constituted no evidence, in and of itself, to support the verdict, in view of the warrant sued out by plaintiff, and that the receipt is a mere acknowledgment of the payment of so much money without more, and does not even purport to be in full of account, and, in addition, said receipt, when taken together with the facts developed in the case, especially the two notes executed by plaintiff below, and held by the defendant and never cancelled and surrendered, state no evidence to sustain the verdict rendered under the warrant, which was sued out in an action for conversion of certain personal property, and this was especially so in view of showing that the property was delivered into the possession of appellants under a writ of replevin, and was not converted as averred in the warrant.

The insistence, in this connection, is, that in no sense could the receipt be construed as evidence to sustain the verdict which was rendered in an action for conversion of certain personal property, and the insistence is, further, that there is no evidence in the record to sustain the verdict upon the warrant for conversion, and, on the contrary, the possession of the property by appellants was fully justified by the action of replevin.

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It is further said, in the third place, under this supplemental assignment of error, that the trial Judge in his charge excluded from the consideration of the jury all the evidence of appellants. The argument under this assignment is, that the receipt was only *prima facie* evidence, but the charge of the Court made it conclusive, and excluded from the consideration of the jury all of the evidence of appellants, and this was clear and palpable error.

In the fourth place, it is insisted under this supplemental assignment of error, as it is called, that even conceding that plaintiff below proved that the furniture was all paid for, nevertheless there is no evidence whatever to sustain the verdict under the warrant beyond seventy-four dollars, and conceding further that the warrant embraced an action for the things broken up, yet there is no evidence to sustain the verdict, in this particular, for more than thirty-nine dollars, and further conceding that the evidence embraced a cause of action for sickness resulting from the execution of the writ of replevin, and conceding that plaintiff below had a cause of action therefor, still there is no evidence whatever to sustain the verdict in this particular for more than \$121.00, and, therefore, if all these items are recoverable under the warrant and in law, there is still no evidence whatever to sustain the verdict for more than \$234.00.

We have looked into the evidence in this case sufficiently, and, in fact, we have examined all the evidence in the case.

Cora Tyler testified that she purchased some furniture from appellants; that she purchased \$123.00 worth, which was the full amount of the bill; that she purchased it on the installment plan; that after purchasing it, she made payments on it from time to time, and paid by the week; that she received receipts for the payments she made; that the bill of goods she purchased was fully paid for;

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that the way she got her last receipt was Mr. Walker came on Monday to collect; that she said, "Mr. Walker, will you please go and find out the exact amount I owe, I want to pay up in full this morning," and he asked me where was the next telephone, and I told him, and he went off and stayed about twenty minutes, and he came back and told me, "I telephoned Mr. Hamilton, and they told me to give you a receipt in full, that I had paid everything I owed."

"I asked him at that time for the full balance I owed him; he said he would go and telephone, and came back in a few minutes and he told me I had paid him everything in full. I paid him then two dollars, that was the balance, and he gave me a receipt in full. I gave you that receipt, I can read and write. The receipt handed me by the officer is the receipt he gave me in full, and reads as follows:

"W. D. HAMILTON FURNITURE COMPANY 311-313
"SECOND AVENUE NORTH, Nashville, Tenn., 3-16-1914
"Received of Cora Tyler Two Dollars (\$2.00) in full.
"W. D. HAMILTON FURNITURE COMPANY,
"Per Walker."

It was admitted by appellants that this was their receipt.

It further appeared that the firm of W. D. Hamilton & Co., was taken over by the Sharp-Flanigan-Hamilton Co., and they just used the old force. Plaintiff below testified that the gentleman with whom she had dealt on that date was named Mr. Walker; that he represented the Sharp-Flanigan-Hamilton Company at that time; that she did not hear anything more from them until the day they broke in her house and took her things away; that they broke into her house while she was away and took everything she had.

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She testified that they had not sent her any notice, and she had not been served with any legal proceedings. She stated that she was down on Fifth and Woodland washing and ironing; that she was coming back that evening, and that a lady who lived in front of her told her: "They are taking your things out of your house." That she said: "No, ma'am, because I have got my key in my possession, it's locked up," and she said, "They are in," that when she got home she said, "Mister, you are in the wrong house, I have a receipt in full." And he said: "I don't want to see a thing you've got, go away." That she went up to Mrs. Goodlett's and asked her to telephone as to the matter. She testified that the officer would not look at the receipt. She testified that they did not take all of her goods out of her house; that they took out her bed, dresser, washstand, chairs and center table; that they did not leave her anything but two stoves; that she had to sleep on the floor that night; that they broke open her house; that the latch was pushed off on the floor, and the lock was broken; that they left the door wide open; that she did not know what a replevin suit meant; that after the gentleman told her he did not want to see anything she had, and that he had a right to take the property, she just went up to Mrs. Goodlett's and had her to telephone and see what was the matter. She testified that they had never brought back her furniture to her, and they still have it.

This is the substance of her testimony, except that she testified as to the value of the property.

She testified that she lost some dishes and fruit and the price of the dishes. She testifies that they left some dry goods on the floor; that her bed clothes were damaged; that they had ink upon them; that they were just dumped down on the floor with ink and fruit all over them. She testified as to the value of the bed clothing. She then testi-

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fies about sleeping on the floor. In other words, according to her testimony, these appellants through their agents acted without any respect or consideration for the rights of plaintiff below.

There is no reversible error in the judgment of the Court below, and it will be affirmed with cost.

A. A. ADAMS, TRUSTEE, v. STONE BROTHERS.

Writ of certiorari denied by Supreme Court, 1915.

LIVERY STABLE KEEPER'S LIEN. *Superiority to mortgage. When.*

A livery stable keeper to whom a mortgaged horse is delivered for care and feed may acquire lien thereon superior to that of the mortgagee by giving the latter notice of the fact that the animal is in his stable and that he intends to look to the mortgagor and mortgagee both for payment. His lien will attach to the animal for all attentions given subsequent to this notice.

FROM WILSON COUNTY.

Appeal in error from Circuit Court of Wilson County.
JOHN E. RICHARDSON, Judge.

A. A. ADAMS for Plaintiff in Error.

F. P. McMILLAN and J. H. CAMPBELL for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

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THIS is a replevin suit originally instituted before a Justice of the Peace of Wilson County by the American National Bank against defendants in error to recover possession of one bay gelding horse three years old.

The Justice of the Peace rendered judgment in favor of said bank, and defendants in error appealed to the Circuit Court. The case was heard by the Judge of the Circuit Court without a jury, after the warrant issued by the justice was amended by substituting A. A. Adams, Trustee, as plaintiff in place of said bank.

The Circuit Judge rendered judgment in favor of defendants in error for the possession of the horse described in the warrant and the costs of the cause.

Plaintiff in error moved for a new trial, which was overruled, and he appealed in error to this Court.

We do not deem it necessary to take up and discuss in detail the various assignments of error in this case. The determinative question in the case is, "Did the Trustee of the American National Bank, or the mortgage in favor of that bank give a lien upon the horse in question, superior to the lien of defendants in error as liveryman?"

It is well settled in this State, we take it, that a party, having a registered mortgage upon a horse, has a lien superior to that of the liveryman who keeps a horse left with him by the mortgagor. The trust deed in this case, by providing for renewals to secure the debt of the bank, did not render it void, as held by the learned trial Judge. The liveryman's whole bill in this case amounted to something over twelve dollars.

It appears that some days before the horse was replevied, the Trustee of the bank, Mr. Adams, was notified that the horse was in the stable of defendants in error, and that defendants in error expected to hold their lien upon the horse to secure payment of their bill.

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Mr. Adams, in his proof, stated that he did not know the horse was there in the stable, and that he would send the owner around to take him out. He was not taken out immediately, or within the next day or two, and Mr. Adams, being informed that defendants in error claimed a lien, for the keep of the horse superior to the lien stated by the mortgage or trust deed to him, brought this suit in replevin.

It appears that the bill, amounting to some five dollars for the keep of the horse, accrued after Mr. Adams was notified of the intention of the liveryman to assert their lien as superior to that of the bank.

We are of opinion that defendants in error had the right, or had a special lien upon the horse superior to that of the bank for keep on the horse, after defendants in error notified Mr. Adams that the horse was in their stable, and that they would claim a lien.

Under this holding, defendants in error had the right to retain possession of the horse until their bill was paid for his keep of the horse after Mr. Adams was notified of the fact that the horse was in their stable.

The result is that Mr. Adams, as Trustee, can get possession of the horse by paying the bill to defendants in error, accrued after he was notified that the horse was in the stable of defendants in error, and that they would insist upon their lien for his keep.

To this extent the judgment of the Court below is modified.

The question of the payment of the cost in this case has given us some trouble. We think, however, that the costs should be paid by the appellant, the Trustee, and it is so ordered.

Street Railway v. Mitchum.

MEMPHIS STREET RAILWAY v. LULA MITCHUM.

Writ of certiorari denied by Supreme Court, 1916.

1. CARRIER AND PASSENGER. *Collision. Question of negligence for Court. When.*

When a passenger upon a street car is injured because of an unexplained collision between two street cars, it is the duty of the Court to state to the jury that as a matter of law plaintiff is entitled to a recovery.

2. SAME. *Question of injury. Peremptory instructions.*

When from the whole of the evidence one conclusion only with respect to whether plaintiff sustained injuries from a collision can be drawn, the only question which the Court should submit to the jury is that of the amount of recovery.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Division Two. WALTER MALONE, Judge.

ROANE WARING for Plaintiff in Error.

BELL, TERRY & BELL for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS is a suit to recover damages from the Memphis Street Railway Company by Lula Mitchum for personal injuries received by her while a passenger in one of its cars.

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The declaration alleges, in brief, that defendant in error on or about January 1, 1913, was a passenger upon one of the railway company's eastbound east end lines, and while she was in the exercise of due care and diligence, and when they had reached a point east of Neeley Street the Company negligently, recklessly, and wantonly ran one of its eastbound cars into the rear and in collision with the car upon which she was riding, knocking her about in the said car and against the seats and floor thereof, inflicting serious, severe, and permanent injuries upon her.

The negligence, it is alleged, consisted in that they failed to have the car in the rear under control at the point stated; that they were negligent in colliding the two cars; that she was injured in her back and side and shoulder, and in the lower part of her stomach; that she was internally injured, and, also, in her head; that she suffered injuries to her female organs; that she has suffered great physical pain and mental anguish; that her earning capacity has been greatly diminished; that she has lost much valuable time and spent much money for doctor's bills and in other efforts to be cured of her injuries to her damage in the sum of five thousand dollars.

The Railway Company interposed a plea of "not guilty". The case came on for hearing before the Court below and a jury in March, 1914. They rendered a verdict in favor of defendant in error against the Street Railway Company for \$1,500.00, and upon this verdict a judgment was entered.

The Street Railway Company moved for a new trial, which was overruled, and it appealed in error to this Court. It assigns two errors before us. The first is directed to the following excerpt taken from the charge of the Judge to the jury:

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"Gentlemen of the Jury:

"You will be bound to find in favor of the plaintiff here because the undisputed proof shows that there was a collision, and that this plaintiff was injured. The only question here is the nature and extent of her injuries. The burden of proof is upon her to show the nature and the extent of those injuries; however, it is your duty to sift the testimony and weigh it in accordance with the rules which I have already given you.

"Now, gentlemen of the jury, it would be your duty, under the proof, to assess the damages of the plaintiff. In assessing those damages, take into consideration her age; take into consideration the state of her health before the casualty; take into consideration her mental and physical pain and anguish; take into consideration her loss of time; take into consideration her earning capacity before and after the casualty; take into consideration the loss of earnings, if any, the plaintiff has showed in the proof; take into consideration all medical expenses incurred by her in her efforts to be cured."

The second error assigned is, that the Court should have set aside the verdict of the jury, because grossly outrageous and excessive, and because it evinced passion and caprice upon the part of the jury.

The contention of the Railway Company under its first assignment of error is, that, in the part of the charge quoted, the Court assumed that the plaintiff was injured in the accident, whereas this was a controverted issue in the case. If it was a controverted issue in the case, of course the charge of the Court complained of was erroneous, and would necessitate a reversal of the case, and its remand for a new trial.

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An examination of the evidence in the record satisfies us that the plaintiff below did sustain some injuries for which she was entitled to recover some damages. The only conceivable dispute in the evidence, as disclosed by the record, is as to the nature and extent of the injuries of plaintiff below.

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It is perfectly apparent from it, that there was, and could be no question as to the fact that the plaintiff below was injured to some extent by the collision of the cars on which she was riding. It was an unmistakable and undisputed case of liability on the part of the Street Railway Company, and the trial Judge, squarely and plainly, told the jury that the question for them to consider was the nature and extent of her injuries, and that they could not assess any damages except compensatory damages for the injuries that she sustained, as the direct result of the collision.

The trial Judge and the jury saw the witnesses who were examined in this case, and if this woman was injured, as the evidence tends to show she was, it can hardly be said that this verdict is excessive.

There is no reversible error in the judgment of the Court below, and it will be affirmed with cost.

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R. B. SEXTON v. B. B. GRIFFIN ET ALS.

Affirmed by Supreme Court, 1916.

1. DOCUMENTARY EVIDENCE. *Judgments and decrees.*

Judgments and decrees when offered in evidence must be supported by copies of the records of which they form a part.

2. SAME. *Exception as to bankruptcy. Evidence of title of trustee.*

By virtue of certain provisions of the bankruptcy Act the above rule is not applicable to certain parts of proceedings in bankruptcy. It is especially provided that a certified copy of the bond of a trustee in bankruptcy shall be sufficient evidence of his appointment and of his title to the assets of his bankrupt; and in suits by him it is not incumbent upon him to produce copies of the whole bankruptcy proceedings.

FROM SCOTT COUNTY.

Appeal from the Chancery Court of Scott County.
H. G. KYLE, Chancellor.

J. C. J. WILLIAMS for Complainant.

HUGHETT & HUGHETT for Defendants.

SPECIAL JUSTICE JOHN W. GREEN delivered the opinion of the Court.

THIS is a bill filed April 30, 1915, in the Chancery Court of Scott County by R. B. Sexton against B. B. Griffith, A. M. Griffith and E. C. Settles to recover of B. B. Griffith on an account of \$535.12. The bill alleges that

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defendant B. B. Griffith, on the 17th day of September, 1914, filed a petition in bankruptcy, but that he did not list a saw mill and certain other property in the schedule of assets, but that he has fraudulently concealed the same and has disposed of them to his co-defendants in order to defraud his creditors. Complainant prays that the saw mill and other property set out in the bill be attached for the satisfaction of complainant's debt. On August 12, 1915, L. Riseden filed a petition in the case, alleging that the mill and other property attached was not subject to seizure because it was an asset of the estate of the defendant Griffith, and subject alone to the administration by the petition as trustee in bankruptcy under the orders of the bankruptcy Courts of the United States for the Eastern Division of Tennessee at Knoxville, and a copy of the adjudication is filed as an exhibit to the petition. The petitioner alleges that he was duly appointed trustee of the defendant Griffith on June 21, 1915, and that he had duly qualified as such, and what is alleged to be a certified copy of his appointment as trustee is also filed as an exhibit to the bill. The prayer of Riseden's petition is that the bill filed by R. B. Sexton against B. B. Griffith and others be dismissed and that they and their sureties be taxed with the costs. Exhibit A to Riseden's petition is a copy of the entry of the United States District Court at Knoxville adjudging Griffith to be a bankrupt, and the certificate to said copy complies with all the forms of law. Exhibit B to the petition is as follows: "In this cause no trustee was appointed at the first meeting of creditors because the schedules showed no non-exempt assets of value and no creditors were present and no claims were filed. The cause has been referred to the Referee, however, and a motion of the bankrupt has been allowed that he be permitted to amend his schedules setting out a saw mill and

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other property as assets of his estate. It is accordingly now hereby ordered that L. Riseden of Wartburg, Tennessee, be appointed trustee by the Referee, and the penalty of his bond is fixed in the sum of \$1,000.00, which he will make with two or more good and solvent personal sureties thereon subject to the approval of the referee. W. J. Donaldson, Referee in Bankruptcy."

Exhibit C to Riseden's petition purports to set out the bond given by Riseden as trustee in bankruptcy, and the order of the referee approving said bond. The exhibit further sets out the order of the United States District Court at Knoxville, appointing W. J. Donaldson referee in bankruptcy, and recites that Donaldson appeared in open Court and gave bond, which was approved, and that he took the oath of office. Horace VanDeventer, Clerk of the United States District Court at Knoxville, certifies that Exhibit C is a full and correct copy of the bond of the trustee, the order of the referee approving the same, and also a copy of the original order of the Court appointing Donaldson referee and approving his bond. The next entry on Exhibit C is a certification by the United States District Judge that Horace VanDeventer is clerk of the said Court, and it then concludes with the certificate of Horace VanDeventer, Clerk of the United States District Court, certifying that Edward T. Sanford is Judge of said Court.

On August 17, 1915, the record recites that the cause came on to be heard before the Hon. H. G. Kyle, Chancellor, upon the original bill and intervening petition of L. Riseden, trustee of B. B. Griffith, and that thereupon the Chancellor decreed that the suit was improperly brought because the Court was without jurisdiction of the defendant B. B. Griffith, or any property owned by him at the time, and complainant's bill was accordingly dismissed,

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and the attachment issued was cancelled and for nothing held. Complainant excepted to the order of dismissal, and said exceptions were overruled, whereupon he has appealed to this Court and has assigned the following errors:

1. In allowing said petition and exhibits to be filed and in dismissing said cause.

2. He was in error in permitting detached portions of the record in the United States District Court at Knoxville in the case of B. B. Griffith, bankrupt, to be treated as a full and complete record.

3. Said detached portions of proceeding in the United States District Court at Knoxville in the cause of B. B. Griffith, bankrupt, are not in compliance and within our Statute—Sec. 5580 of the Code of Tennessee, and hence it was error to base a decree of dismissal thereon.

4. Because there was no legal evidence submitted along with said petition, that the petitioner had ever been appointed trustee of B. B. Griffith, bankrupt, and it was error to have so held.

It will be thus seen that the only question for the determination of this Court is whether or not L. Riseden's official character as trustee in bankruptcy has been sufficiently and technically shown. If it has, the Chancellor's decree is correct. If it has not, the Chancellor's decree is erroneous.

In the case of *Hamon v. Foust*, 127 Tenn., 32, it was held that a discharge in bankruptcy must be proved in the same manner as any other judgment or decree, and that where such discharge was merely certified by the Clerk of the Federal Court granting the same, without the certificate of the Judge, it was properly excluded, and that a judgment or decree of the Federal Court sitting within this State must be certified as required by Section 5580

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of Shannon's Code. It is claimed for complainants that this decision is conclusive of the case, and that the certificates to Riseden's petition are fatally defective. Section 5580 is as follows:

"A judicial record of a sister State, or of any of the Federal Courts of the United States, may be proved by a copy thereof, attested by the Clerk, under his seal of office, if he have one, together with a certificate of a Judge, Chief Justice, or presiding magistrate, that the attestation is in due form of law."

The three exhibits, the substance of which we have quoted above, if taken singly, each by itself, might not be sufficient to substantiate the status of the petitioner Riseden, but we think there is such mechanical unity between them as to require us to consider them as one document. While this is true, it is evident that they do not constitute the entire record of the bankruptcy proceeding, as for instance the petition in bankruptcy is lacking, as are the minutes showing the meeting of creditors to elect a trustee, and neither does it appear that the majority in number and amount of creditors participated in said meeting, nor does it appear that the trustee was directed by the Federal Court to intervene in this proceeding. In other words, it is not a complete record.

It was held by the Supreme Court of this State in the case of *Willis v. Lauderback*, 5 Lea, 561, to be error to permit a decree in another cause to be read in evidence when objection is made upon the ground that the entire record should be produced, especially when the record is essential to make out plaintiff's case.

Again in the case of *Smith v. Hutchison*, 104 Tenn., page 394, it was held that where a Court partition of land constitutes a link in title, it cannot be proved by the pro-

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duction of a copy of the final decree alone, but must be proved by the production of a copy of all essential parts of the record.

This doctrine was reaffirmed in the case of *Russell v. Houston*, 115 Tenn., page 541, where it is held that the rule is general that the whole record must be produced when it is in existence.

In the case of *Railway v. Seymour*, 113 Tenn., 523, it appeared that one Arminda Seymour first brought her suit in the Circuit Court of Union County, and that this suit was removed by the Railway Company to the Circuit Court of the United States, where she dismissed it more than a year after the action accrued. Thereupon Arminda Seymour brought another suit, averring in her declaration, in order to avoid the statute of limitations, that the present suit was brought within one year after the dismissal of the suit in the Federal court, and filed in support thereof a copy of the judgment dismissing the case in the Federal Court. The Supreme Court held that there is no rule of the common law or statute providing for the certification of portions of a record by Clerks of the different Courts in which a case has pended, and that the transcript of the judgment of the Federal Court was incompetent because it was only a part of the record.

Exception was duly made in the Court below to the incompleteness of the record, and in our opinion the exception was well taken unless the bankruptcy act itself has made provision for proving the fact of trusteeship which has been complied with by the trustee in this case.

Section 21 of the bankruptcy act provides that certified copies of proceedings before a referee, or of papers issued by the Clerk or referee shall be admitted as evidence with like force and effect as certified copies of records of the District Courts of the United States are now, or may here-

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after be admitted as evidence, and that certified copies of the order approving the bond of the trustee shall constitute conclusive evidence vesting in him the title of the bankrupt.

Undoubtedly Exhibit C to Riseden's petition does show the trustee's bond and the order of the referee approving the same and this exhibit is duly certified to by the Clerk of the United States Court and the official character of the Clerk is certified to by the United States Judge and the official character of the Judge is certified to by the Clerk. This certificate is in the form prescribed by Section 5580 of Shannon's Code.

We see no reason why the act of Congress may not lawfully prescribe what shall be sufficient proof of the trustee's official character. It has undertaken to do so, and its provisions have been complied with, and we know of no law which authorizes us to ignore these provisions.

The result is we hold that the Chancellor was correct, and affirm his decree with costs.

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T. C. RAILWAY COMPANY v. DR. SAM DENTON.

Writ of certiorari denied by Supreme Court, 1915.

RAILROADS. *Fencing Act. Gate at private crossing. Negligence of owner of animal killed.*

Where an animal killed by a moving train was upon the track because of the negligence of the owner in leaving open a gate at a private crossing erected by the railway company for his benefit, there is no liability therefor, the contributory negligence of the owner defeating his right of recovery.

FROM PUTNAM COUNTY.

Appeal in error from the Circuit Court of Putnam County. C. E. SNODGRASS, Judge.

ALGOOD & FINLEY for Plaintiff in Error.

O. K. HOLLADAY for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS suit was commenced by defendant in error May 1, 1914, before a Justice of the Peace to recover damages from plaintiffs in error as receivers of the Tennessee Central Railroad Company for negligently killing one of his horses by one of its moving trains.

The Justice of the Peace, May 9, 1914, rendered judgment against plaintiffs in error in favor of defendant in error for \$190.00 and the cost.

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An appeal was taken by the receivers to the Circuit Court of the county.

In the Circuit Court the warrant issued by the Justice of the Peace was amended by permission of the Court by inserting in the warrant after the word "trains" in the next to the last line in the warrant, the following, "And on this unfenced track, and without observing the statutory precautions, on May 4, 1912, about one-fourth mile east of Buffalo Valley Station, in the Ninth Civil District of Putnam County, Tennessee."

The Circuit Judge tried the case without a jury and rendered judgment against the receivers for \$200.00 and the costs.

They moved for a new trial and in arrest of judgment, which motions were overruled, and they appealed in error to this Court.

All the assignments of error may be disposed of under the first and third errors assigned, and, in fact, legally considered, the case might be disposed of under the first assignment.

The learned trial Judge, in his opinion, filed in the case, found that the statutory precautions were complied with by those in charge of the train as soon as the horse appeared on the track, and he did not rest his decision upon the ground of a non-compliance with the statutory precautions. He predicated his decision upon the ground, that the fence enclosing the premises of defendant in error was not a lawful fence, and he held that although the horse may have gone through a gate left open by defendant in error, himself, still, as the fence was not a lawful fence, the company was liable.

It appears that Dr. Denton had his residence adjoining the right of way of the railway company, and that the right

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of way separated his premises and residence from the public road and that there was a private crossing from the public road, or from the side of the right of way next the public road across the right of way, to the premises of defendant in error.

It further appears that there was a gate across this private crossing alone for the benefit of Dr. Denton at each side of the right of way.

It appears that the railway company, originally, erected gates at each side of its right of way at this private crossing, but they were iron gates, and it seems were heavy and sagged, and Dr. Denton himself placed two gates in the place of those erected by the company.

One of these gates, the one on the side of the right of way next to the public road, was a self-closing gate, and the one on the side of the right of way next to his premises had to be closed and fastened by persons going through it.

It further appears that Dr. Denton came in late in the evening, possibly about dark, before the horse was found injured the next morning.

When the doctor arose next morning about daylight he found his horse out of his pound or lot in which he had placed him, and that the gate to this pound or lot was unfastened. According to the undisputed testimony, the horse passed out of this lot or pound in which the doctor put him when he arrived home late in the evening before.

It is manifestly clear and undisputed from the evidence in this record, that some one turned this horse out of the lot or pound in which the defendant in error placed him when he returned home late the evening before, or that the horse, in some way, opened the gate to said lot or pound, and walkd out of it, and then through the gate at the right of way left open by defendant in error when he came home

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the evening before, and in this way entered upon the right of way of the railway company.

The railroad section men, or some of them, passed along there late in the evening, or some time in the evening, before the horse was found dead the next morning, and the gates across this private crossing were closed; but, as before stated, Dr. Denton testified that when he came home that evening, the gate on the right of way, or at the edge of the right of way, next his residence, was open, and that he left it open and never closed it, that is, the gate that opened upon the right of way through his premises.

As before stated, the section foreman of the railway company, according to his testimony, passed there that evening and that gate was closed. It is clear, therefore, that it must have been left open that evening by some one before Dr. Denton came home. There is no pretense in the evidence in this case, That the gate was left open for a sufficient length of time to effect the company with knowledge, or constructive notice, that it was open, and, hence, that they were negligent in not having closed it. *Greer v. R. R. Co.*, 20 Pick., 242; 3 Elliott on Railroads, Sec. 1200.

Now, the learned trial Judge never predicated his decision upon the fact, that the gate was left open by any of the servants of the Company, or that it had been left open a sufficient length of time to fasten notice upon the Company that it was open.

Now, as before stated, these gates across this private right of way at the respective edges of the right of way was placed there by Dr. Denton himself. The learned Judge said in his findings: "That the proof in the case as to the fence that forms a part of this enclosure of the premises of Dr. Denton otherwise than the gate, is that it is not a sufficient fence, the law requiring the fence to be

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of a certain height, five feet high, and providing what shall be a lawful fence, and the proof shows, and it is not contradicted, that this fence is not five feet high, that is is about four feet high, and that the posts are in some places sixteen feet apart, some a little further apart, and some a little closer together, and it is not the kind of fence that the law denominated a lawful fence, and I think, in legal contemplation, equivalent to no fence."

It was insisted by the railroad company that the place where this horse went upon the railroad's right of way was a place where the fence met the lawful requirements; that is, that the horse went through the gate left open by Dr. Denton, and that his negligence in leaving the gate open was the proximate cause of the collision, and that it thus affirmatively appearing, the fact that the fence along the right of way dividing the right of way from the premises of Dr. Denton at other places, was not up to the standard did not make it liable.

His Honor repudiated this contention and held that the place referred to with respect to a lawful fence means the premises enclosed. In other words, he held that the railroad company fencing its right of way and which forms a part of the fencing off of the right of way from a man's premises, must be kept up to the full height all the way across the man's premises, and if it fails in this respect, if an animal gets through a gate left open by the owner of the premises, when the gate is a lawful gate, the railroad company is nevertheless liable.

We think the death or injury to this horse was the direct result of the gate at this private crossing next the premises of Dr. Denton being left open by him late the evening before, and as the result of the horse getting out of the pound or lot in which Dr. Denton placed him when he arrived at home late the evening before.

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Manifestly, if the gate to the pound was not negligently fastened, someone not connected with the railway company turned the horse out of the lot or pound, and that left him free to go on the railroad right of way through a lawful gate at the right of way left open by Dr. Denton.

Under such a state of facts, and they are practically undisputed, we think the railroad company is not liable, and the judgment of the Court below must be reversed and the case dismissed.

J. W. PERRY v. KNOXVILLE RAILWAY & LIGHT COMPANY.

Affirmed by Supreme Court, 1916.

1. CARRIER AND PASSENGER . *Street cars. Mounting overcrowded car. Assumption of risk.*

A party who knowingly mounts an overcrowded street car and takes a position among the passengers on the platform assumes the ordinary and usual risks of such situation; and he must exercise such reasonable care for his own safety as the circumstances would suggest to an ordinarily prudent person.

2. SAME. *Accepting passengers after car full. Not negligence as a matter of law.*

A street car company is not guilty of negligence in making the passengers after its seating capacity has been reached is not guilty of negligence as a matter of law.

3. SAME. *Starting of car. Jerking and lurching.*

A street car company is not guilty of negligence in making the jerks and lurches unavoidable in the necessary stopping and starting of its cars; and when a passenger is injured because of jerks and lurches, it is incumbent on him to show that these movements were unnecessary or improper in the practical operation of the car.

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4. *SAME. Degree of care.*

A carrier of passengers is bound to exercise the highest degree of care in its equipment, and is bound to exercise the same degree of care with respect to use consistently with the practical operation of its instrumentalities. But notwithstanding this high degree of care, the passenger must himself exercise ordinary care to preserve himself from injury.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
VON A. HUFFAKER, Judge.

HARRY HALL for Plaintiff in Error.

CHAS. H. SMITH for Defendant in Error.

SPECIAL JUSTICE R. H. SANSON delivered the opinion of the Court.

THIS is an action for damages for alleged personal injuries, laid in the sum of \$5,000.00. The declaration avers that the defendant in the operation of its line of street railway in Knoxville accepted the plaintiff in error as a passenger upon one of the Company's cars going to Fountain City, a suburb of Knoxville. It further avers that the defendant was guilty of negligence and wrong resulting in damages to plaintiff, by reason of the fact that the car was overcrowded at the time plaintiff was accepted as a passenger thereon, as a result of which he was injured; that the car in its operation by the servants and agents of the company was started with a jerk, so that plaintiff was thrown against an obstruction in the rear of the car and received injuries by other passengers pressing him against or upon this obstruction; that the servants

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and operatives of the car were incompetent, and that the company was negligent in accepting as passengers upon the car parties having parcels in their hands, so that in the crowded condition, the jostling among each other of the passengers had a tendency to injure and did contribute to plaintiff's injury. To the declaration the defendant company plead not guilty, and upon these issues the case went to the jury.

The facts, very briefly stated, are that on the evening of the 25th of February, 1912, at 6 o'clock in the evening, and when it was very cold and snowing, the defendant sought and secured passage upon one of the large cars of the defendant, entering the car and paying his fare at Newcomer's on Gay Street in Knoxville; that at the time he entered the car, which had a seating capacity of thirty-eight passengers, the car was crowded, and all the seats filled, the entire aisle of the car filled with standing passengers, and a large part of the rear platform of the car was then full with passengers standing. The plaintiff in error took his position on the rear platform of the car at or near the controller, which seems to be explained in the record as being a metallic appliance some three feet in height and perhaps six or eight inches in diameter, solidly fixed on the rear platform and used as one of the appliances in operating the car. It further appears as a fact that this car at that hour was always, or practically always, in this crowded condition; that that was the popular hour for the suburban residents of Fountain City to take the car to convey them to their homes. The plaintiff in error was a resident of Fountain City and knew this fact, as he frequently used the car. It further appears that as the car proceeded on its way it took on board some few passengers, two or three, at Vine Street, and then proceeded on down to Jackson Avenue, where perhaps two or

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three more people were admitted. It further appears that the defendant was injured by being pressed against the controller, by or against which he was standing, or that someone with a dinner pail or other parcel who had entered the car as a passenger was jostled against plaintiff, and he received the alleged injuries as a result thereof. Before reaching Jackson Avenue the plaintiff had stated to the conductor of the car that it was crowded and that he ought not to receive further passengers, and was told it was his orders to receive passengers as long as they demanded entrance and there was standing room for them. Whereupon plaintiff in error stated to the conductor that if he would give him his fare back he would retire from the car, this the conductor told him he could not do. The plaintiff did alight from the car at Depot Street, perhaps the next station after Jackson Avenue, and waited over and took the next outgoing car from Fountain City.

After the introduction of testimony in the Court below the Court charged the jury, who rendered a verdict against plaintiff in error and in favor of defendant in error the Knoxville Railway & Light Company. Judgment was pronounced upon this verdict, and from that judgment of dismissal this appeal is prosecuted and errors assigned.

The first four grounds of error assigned need be given no extended consideration. The errors follow in substance: (a) That there is no evidence to support the verdict. (b) That the evidence preponderates against the verdict rendered. (c) That the verdict is against the law as charged by the Court. (d) That the verdict indicates partiality, passion, caprice and prejudice on the part of the jury in favor of defendant Knoxville Railway & Light Company, and against plaintiff in error. The rules of law appertaining to assignments of error are so well established that they need not be repeated. By the terms of

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these rules the insufficiency of these assignments is so clear and apparent as that they cannot be taken into consideration, and are accordingly overruled.

It is next assigned as error that the Court charged the jury as follows:

“It was its duty to furnish him with a reasonably safe place in which to ride. As a passenger he had a right to ride upon the platform, and the defendant company if the car was crowded had a right to allow him to ride upon the platform, and the plaintiff, if he wanted to, had a right to be there, but if he did ride upon the platform, if he got upon the car when there was no other place, than the platform where he could ride and saw and knew it, he puts himself in that situation subject to the known conditions that exist, and he is required to exercise the reasonable and ordinary degree of care, caution and prudence, as to whether or not he is placing himself in a dangerous or safe situation, and he would be guilty of negligence or not according as the situation presents itself as dangerous or otherwise. Now if either the plaintiff or defendant failed to discharge the duties thus explained to you, the duties imposed upon them by law, the party thus failing would be guilty of negligence.”

It is to be observed that this is but an excerpt from the charge of the Court, and while it is questionable if there be serious error in this clause of the charge taken separately, yet by reference to the charge taken as a whole it is entirely clear that the trial Judge committed no reversible error in his instructions to the jury upon the question constituting the subject matter of this excerpt, and this assignment is overruled.

It is next assigned as error that the Court charged the jury as follows:

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"As stated a moment ago, gentlemen, you must determine in view of the existing conditions and situation that confronted the plaintiff at the time he boarded this car, its crowded condition, the position he would have to take, that is, standing upon the platform, or otherwise; you would have to look to all of these things and determine whether or not the plaintiff exercised the reasonable and ordinary prudence for his own safety in boarding the car under such conditions, and according as you determine that question, his action will or not effect this case and his right of recovery as I have already explained to you."

It is next assigned as error that the Court charged the jury as follows:

"Gentlemen, you will take into consideration the fact that a car cannot be started without more or less jerk or motion, you can't start from a standstill to a motion without more or less jerking. Now, such jerking or lurching, as was necessary in the starting of the car was permissible and it makes no difference what the consequences were, there could be no recovery because the defendant was permitted to operate its cars. They had to stop to let passengers off and on, and they had to start again, and they are permitted to do that which is necessary to start them, and there could be no recovery for that, and if you find that was all that was done in this case, then the plaintiff's case must fail upon that view, and there could be no recovery for failure to properly operate the car."

It is next assigned as error that the trial Judge erred in overruling 11, 12, 13, 14 and 15 "*assignments of error*" in plaintiff's motion for a new trial, by assignments of error here is meant plaintiff's requests for special instructions to the jury which were declined. These are:

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"A."

"I instruct you, gentlemen of the jury, that if you find from the evidence in this case, that at the time of the alleged accident, to plaintiff, if you find from the evidence that such accident did occur, that defendant's car was overcrowded, and that plaintiff was compelled to stand while riding as a passenger, and that the defendant in the operation of its cars, caused same to lurch and jerk unnecessarily, thereby throwing plaintiff against parts of said car, the jerking or lurching of said car unnecessarily and the throwing of passengers against him, thereby injuring him, and you find from the evidence that such facts above mentioned, were the prime, proximate and efficient cause of the injury inflicted on plaintiff, then the defendant company is liable in damages to the plaintiff and you ought to so find."

"B."

"I charge you, that if you find from the evidence in this case, at the time of the alleged accident here complained of, and while plaintiff was aboard said car as a passenger; that said defendant company undertook to and was carrying a number of persons in excess of the car's capacity so that passengers were compelled to stand upon the platform of said car, if such be a fact in such facts and circumstances from which the jury may infer negligence or is evidence of negligence on the part of said defendant company."

"C."

"I charge you, gentlemen of the jury, if you find from the evidence in this case that the defendant company, while the plaintiff was a passenger thereon, allowed and permitted its cars to become overcrowded, so that plaintiff was

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compelled to ride standing up, either in the aisle, on platform or steps of said car, if these facts be proven in evidence in this case, then under such circumstances the defendant company was onerated with the duty of exercising a high degree of care for the safety of said plaintiff, and said company is bound to take such additional precautions as may be necessary to protect its passengers from the results of such overcrowding."

"D."

"I charge you that if you find from the evidence in this case, that the plaintiff while a passenger upon the defendant company's car, and as such passenger he was compelled to ride upon the platform or other exposed position by reason of the seats, aisles, and other parts of said car being crowded and occupied, the fact if it be a fact, that plaintiff rides in such position, is not negligence upon the part of the plaintiff. I charge you that if such be a fact from the evidence, and you believe such to be a fact from the evidence he is lawfully under such circumstances on the platform or other exposed parts of said car voluntarily, and from that fact alone, plaintiff would not be guilty of contributory negligence."

"E."

"I charge you that if you find from the evidence in this case, that if the evidence shows that said car was overcrowded, or crowded, and said defendant received plaintiff as a passenger, it would be negligence on the part of said plaintiff to board said car."

We are constrained to hold that these assignments, if they can be treated of at all under the rule, in the form presented, and we shall treat of them as though they were

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in proper conformity to the rule, are insufficient. The excerpt 'A' cannot be considered as a sound proposition because there is no liability upon the part of the railroad company to be predicated upon the overcrowded condition of the car or the fact that passengers were compelled to stand. If the passengers saw proper to take passage under those conditions, the risk of the overcrowded and standing condition was a risk assumed by him; the request being that the plaintiff in error would have been entitled to recover if the defendant in error undertook to and was carrying a number of persons in excess of the car's capacity, so that passengers were compelled to stand upon the platform; that if such were the facts the jury might infer negligence on the part of the company therefrom. This is not the law and the refusal to charge same was entirely proper on the part of the Court. This request by necessary construction implies that it would be negligence for which the company would be liable if it accepted passengers in excess of the seating capacity of the car and such proposition does not come within the purview of reason or the law. The request "C" had already been correctly covered by the Court's charge and was properly declined. The request "D" is not the law as stated in the request, because the principle of assumed risk is entirely eliminated, and it would have been error for the Court to have charged the law, as requested, eliminating that element, and the same is true in respect of the special request "E", which does not take into consideration the question of assumed risk. The law seems to be clearly settled that a company using electricity as a motive power is charged with the highest degree of care and prudence as touching the question of its *appliances*, and this is eminently proper, because, when dealing in and utilizing so powerful and dangerous an agency as electricity, it should be properly caged and safely

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bound within such limits by such means as will protect passengers from contact therewith and the extreme element of danger resulting from such contact. In respect to the *operation* of cars themselves it is charged with that degree of care and diligence necessary for the proper protection and avoidance of risk and hazard on the part of passengers, but passengers are likewise charged with the duty of observing conditions and protecting themselves from the ordinary risks and hazards subject to travel, and if a street car propelled by electricity has all its appliances in proper condition, as seems to have been the fact in this case, no charge of defect having been made in the declaration or asserted in the proof, suffer and permit passengers to enter same so that not only the seating capacity is entirely exhausted, but the aisles and platforms are filled with standing passengers, and if that condition of affairs be apparent to passengers desiring to enter the car, and they do enter with these conditions open and apparent, then they assume the ordinary risks incident to such conditions. The averment based upon which a reversal is most seriously contended for in this case is that there was a lurch or jerk of the car when started, after it had stopped at Jackson Avenue, two or three blocks from the point of entry by plaintiff in error as a passenger thereon, and that he received injuries as a result of this lurch, and jerk, by being thrown against the controller or stricken with a package in the possession of other passengers standing with him in the crowded platform. There is some evidence in the record to support the idea that there was a jerk as the car started at this point. Reasonable men must take cognizance of the fact that any vehicle, propelled by any sort of power cannot be put in motion without more or less of a movement or jerk, so that the question of the lurching and jerking was a matter that was necessarily and correctly submitted, under the charge

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of the Court, to the jury for its determination, and the jury has resolved that question, under proper charge, in favor of the defendant in error. The *necessary* movement, lurch or jerk incident to the starting of cars at a standstill and the hazard incident to such movement or jerk is an assumed risk of all passengers entering a car. That being true and the jury having said, by its verdict rendered under proper charge, that there was no *unnecessary* or *improper* jerk, and having resolved the other facts in issue against the plaintiff in error, this Court is left no recourse other than to overrule the assignments of error and affirm the judgment of the lower Court, which is accordingly done.

WALTON-McDOWELL COMPANY v. W. F. BAKER.

Writ of certiorari denied by Supreme Court, 1915.

1. MASTER AND SERVANT. *Negligence of latter with respect to obvious dangers. Assurance of safety.*

A servant who continues to work in a situation and to use instrumentalities obviously dangerous, cannot recover from his master notwithstanding an assurance of safety.

2. SAME. *Special assurance of master and promise as to precaution.*

But in such case if the master after complaint of the servant of the obviously dangerous situation and defective instrumentalities, promises the servant that certain precautions which will obviate the dangers will be taken, the servant is not guilty of negligence as a matter of law in continuing in

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the service; and if the master neglects to take the promised precaution and the servant is injured in consequence, liability for his injuries attaches.

FROM DAVIDSON COUNTY.

Appeal in error from the Circuit Court of Davidson County. THOS. E. MATTHEWS, Judge.

AUST & MCGUGIN and P. M. ESTES for Plaintiff in Error.

W. H. WASHINGTON for Defendant in Error.

PRESIDING JUSTICE WILSON delivered the opinion of the Court.

THIS is a suit by W. F. Baker to recover damages from the plaintiff in error for personal injuries received by him while in its service. The suit, as originally brought, was against three concerns, two partnerships, and plaintiff in error, a corporation. It was dismissed as to the partnership.

The declaration contains two counts.

Plaintiff in error pleaded "Not guilty."

The case was heard in the trial Court and resulted in a verdict of the jury for three thousand dollars against plaintiff in error.

It moved for a new trial upon numerous grounds, and its motion being overruled, it appealed in error to this Court. It assigns the following errors:

1. The Court erred in not sustaining its motion for a directed verdict in its favor, because the undisputed evi-

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dence shows the danger of running the engine and cars down the steep grade with broken brake beams on two cars and defective engine brakes, and this danger was open, obvious, and glaring, and was such that no prudent man would have taken the risk, and under such circumstances plaintiff below could not claim to have relied upon any indefinite promises to repair or general direction to proceed with the work.

2. Because, in any event, the damages, to wit, three thousand dollars, is excessive, and is the result of passion, prejudice, or caprice on the part of the jury.

We can, in a few words, dispose of the second assignment of error. If defendant in error was injured as he testified he was, and as the evidence tends to establish by others, and if he suffered as he testified he did, and does, it is difficult to appreciate the argument that a verdict of three thousand dollars is excessive, and so excessive as to indicate passion, or prejudice on the part of the jury, assuming, of course, that defendant was not guilty of contributory negligence materially affecting and lessening the damages to which he would otherwise be entitled.

The real defense to the maintenance of the verdict and judgment against appellant in this case is raised under its first assignment of error. It rests upon the proposition of fact, that Baker, the engineer in charge of the dinkey engine pulling the three loaded cars from the railroad cut, to be dumped through a trestle or fill underneath, down the incline of the track to the trestle, was dangerous work, owing to the fact that the engine and cars might get beyond his control, even if the engine and attached cars were properly equipped with perfect and up-to-date brakes, and that it was extremely dangerous to attempt to take the train down the said incline with defective brakes on the engine

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or on one or more loaded cars, and that in attempting to do this work, the danger being open and obvious, and known to him, he assumed the risks incident to the work.

In this connection it is insisted that he assumed this open, obvious and known danger, although it be shown in the proof that his immediate superior was informed of the defective condition of the brakes, and he was told to go ahead, that he would repair all of the defects required. In other words, the argument is that Baker had no right to run into and upon an obvious danger known to him, even upon the order of his superior or master, and, having done so, in this case, upon his own theory of the evidence, he cannot now, having received an injury, hold the master liable in damages therefor. The rule of law involved in these contentions of counsel of appellant, is, we think, well settled by our cases, as well as by the great weight of authority in other jurisdictions. An employe has no right to engage in a work that is openly and obviously dangerous, the danger of which is fully known to him, even if ordered to do so by his employer; and he cannot rely upon the assumed superior knowledge of a superior in charge of the employe to avoid an assumption of risks which are open, patent, and known to him and appreciated by him. The general rule, of course, is, that the employe assumes all the risks properly incident to the employment in which he engages. He assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him, by the exercise of ordinary care and foresight. *Held v. Wallace*, 109 Tenn., 346; *Smith v. Dayton Coal, Etc., Co.*, 115 Tenn., 543.

It has been held in numerous of our cases, that a servant, who knows or has means of knowledge, of obvious and dangerous defects in appliances, and continues in the per-

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formance of the work, assumes the risk thereof. Authorities, *supra*; *Morris Brothers v. Bowers*, 105 Tenn., 59 *et seq.*

A half dozen other cases or more might be cited.

So, it has been held that an employe assumes the risks incident to the work he is directed to perform, including an increased risk arising during the performance of the work in which he is fully aware of the danger, and does not rely upon a promise to repair. *Knox v. Pioneer Coal Co.*, 99 Tenn., 546; *Corbett v. Smith*, 101 Tenn., 308.

Now, under the evidence in this case, it is quite clear from the testimony of Mr. Baker himself, that he was fully aware of the danger of attempting to take this train of loaded cars with the dinkey engine he was controlling down the incline on to the trestle to be unloaded there, and if there was nothing else in the case, he would be precluded, obviously under the decisions, from a right to recover in this case. Authorities, *supra*.

Generally speaking, an employe working knowingly with defective machinery or tools takes the risk thereof, and when he himself and his master may both be in fault, he cannot recover. We do not deem it necessary to cite all of our authorities supporting the above proposition. The authorities before referred to abundantly sustain it.

The rule to be deduced from all the authorities, as we understand them, is that if a plaintiff in a case is aware of the danger attending his work, or it is so obvious and apparent that a man of ordinary intelligence would have seen it, then he is taken to have assumed the risks and hazards, and will not be entitled to recover. *Bailey on Personal Injuries*, sections 501-2, 796; *Brown v. Electric Ry. Co.*, 101 Tenn., 252; *Ohio River R. Co. v. Edwards*, 111 Tenn., 31.

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Now, as before stated, if there was nothing else in this case, it is quite plain, we think, from the authorities cited, that plaintiff below would not be entitled to recover in this case. In order, however, to fully understand the situation in which he was placed, it is necessary to make a short statement of the situation and location of the territory and the character of work that he was ordered to perform.

The plaintiff below was employed at the time of his injury and had been for some time, as an engineer on a train of cars operated by a dinkey engine, hauling dirt and rock down an incline to a dump. This dump was an extended trestle which was being filled in by dirt and rock that was hauled from a cut of the Lewisburg & Northern Railroad Company for that purpose. After the cars left the cut a short distance, the track upon which the engine and cars were being operated started down a rather steep incline to the trestle. Mr. Baker, the plaintiff below, it appears from some of the proof, complained to his immediate foreman on the day of his injury, who was in charge of that part of the work and whose duty it was to keep the cars and engine in good repair, this being a Mr. Lane, and he promised to repair the cars, and at the time ordered plaintiff below to go ahead with the work.

When this complaint, with respect to the condition of the brakes in the engine and car was made, there is some evidence in the record, to the effect that Lane, the foreman and party in charge, inspected and examined the defects in the brakes, and after doing so, promised to have them repaired and ordered plaintiff below to proceed with his work with his train.

Now, it appears that there was upon the incline a derail switch, which was put there for the purpose of throwing those cars and the trains from the track, in case the train got beyond control coming down this incline. This

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derailed switch, it appears, was some 100 feet from the trestle. The grade was probably 1,000 feet in length, reaching from the steam shovel to the dump, that is, to the steam shovel in the railroad cut.

Now, this derailed switch was in charge of a servant of the company, who, it seems was a colored man. As Mr. Baker was taking down his train of three cars, soon after he struck the incline, his train got beyond his control, and he gave the signal whistle for the man at the derailed switch to open it, so the train could pass on it and on to the ground without being wrecked on the trestle. There is evidence that it was the custom and the usage of the business, known to all parties, that when the engineer in charge of the dinkey engine pulling a train of cars on to the trestle, if, when he started down the incline, the train got beyond his control, to give a signal whistle to the man in charge of the derailed switch, and it was his duty to open it so the cars could pass on to it and not into the trestle and be wrecked.

In this case, there is evidence tending to show that Mr. Baker, when this train on the occasion of his injury started down the incline, he discovered that it was getting beyond his control, and his testimony is that it got beyond his control because of the defective condition of the brakes. He gave the alarm whistle for the servant at the derailed switch to open it so his train could pass on to it. The servant in charge of the derailed switch neglected to perform his duty, and the result was that the train passed on out on the trestle, and just before it reached its end, Mr. Baker, in order to save his life, jumped from the train to the ground below, some eighteen or twenty feet, and received the injuries for which he sues.

The train went on over the end of the trestle and was wrecked.

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The insistence, in this connection is, that this injury was brought about and occurred in consequence of the negligence of the master in connection with the defective brakes, and the negligence of a fellow-servant, that is, the man in charge of the derailed switch, and, hence, in such case, plaintiff below is not barred of his right to recover. Eminent counsel of appellant does not dispute the proposition that the negligence of a fellow servant co-operating with the negligence of the master does not defeat a right of action on the part of a servant receiving injury resulting therefrom. This is the sole ground in this case upon which this recovery can stand.

We are not called upon to weigh and decide upon which side of the controversy the weight of the evidence is to be found in the record. The case stands upon the narrow margin, that the plaintiff below was excused, as a matter of law, primarily, from attempting to take his train down this incline with the defective brakes, because of the existence of this derailed switch, which could take his train off of the main track, if he discovered that his train got beyond his control, and that the negligence of the man in charge of the derailed switch was not attributable to him. In other words, the case rests upon the narrow basis, that here was a defective brake in this train of cars, and the plaintiff below was told to go ahead and he had the right to assume, that, although it was dangerous and extremely so, if the danger put his train beyond his control, he would be protected by the operation of the derailed switch.

Upon this narrow basis we feel constrained to uphold and sustain the verdict and judgment in this case, and it is so ordered.

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G. P. WALKER ET AL. V. S. H. MONGER ET ALS.

1. PLEADING AND PRACTICE. *General averments and conclusions.*

It is an inflexible rule of pleading that the pleader must allege facts out of which duties and obligations arise, and that general averments and conclusions will not suffice.

2. PUBLIC SCHOOL OFFICIALS. *Discretion as to management of schools.*

It is the legislative intent in Tennessee to vest the management of county public schools in the school boards of the State and to give them a wide discretion as to number and location of schools and method of operation; and this discretion cannot be interfered with by the Courts in the absence of fraud or illegal acts.

FROM ROANE COUNTY.

Appeal from the Chancery Court of Roane County.
HUGH G. KYLE, Chancellor.

LINDSLEY, YOUNG & DONALDSON for Complainants.

WRIGHT & JONES and W. F. HOLLAND for Defendant.

SPECIAL JUSTICE R. H. SANSON delivered the opinion of the Court.

THE bill in this case was filed by a number of citizens, residents and taxpayers of the Third Civil District of Roane County, Tennessee, against the defendants, members of the High School Board of Roane County. Its purpose being to prevent the removal of a certain school house in Roane County, and consolidation of one or more of the

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schools in the county. The averments of the bill are numerous and lengthy.

The prayer of the bill in substance is that the defendants be required to employ competent teachers and maintain the public school building at Acme school house, and that the tearing down and removing of the Acme school house be enjoined; that on final hearing a decree be pronounced annulling any action of the High School Board in abolishing the school district and undertaking to consolidate the schools mentioned in the bill.

The bill was sworn to and fiat granted thereon for the issuance of the injunction as prayed; bond was given for injunction and the same was issued. On motion of the defendants the injunction was dissolved in so far as there was any mandatory feature thereof, and dissolved really in all respects except as to the removal of the school building, in this it was permitted to stand. The defendants then demurred to the bill, the demurrer being as follows:

"Because by said bill complainants seek to prevent a change of the location of the public school at Acme, Roane County, Tennessee, and to require said school board to maintain a public school at said place and to prevent its consolidation with the public school at Bradbury in said county, and to enjoin the disposal of said Acme school property, when the full power to locate, establish, abolish, consolidate, maintain, and control the public schools of said county, including the schools in question, is by law conferred upon the defendant school board, in the exercise of said power by said board, was and is, a discretionary and judicial, not a ministerial function, and it does not appear from any fact or facts alleged in the bill that said board, in the exercise of its powers and functions acted arbitrarily, capriciously or oppressively with reference to the matters complained of or was actuated by any other

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motive than that of discharging its duties in the usual, ordinary and proper manner as required and authorized by law in such cases, wherefore, these defendants pray the judgment of the Court whether they should be required to make further defense."

And the Court sustained this demurrer and dismissed the bill. From the decree sustaining the demurrer this appeal is prosecuted and errors are assigned to the action of the Court in the sustaining thereof.

The first question for the Court to determine is whether or not the averments of the bill are sufficient in and of themselves in their statement of facts to constitute a sufficient basis for action, or whether they are limited too largely to conclusions rather than facts. The bill charges:

"That the action of said High School Board in abandoning and selling the school building at Acme with a view to consolidating said school with the proposed school at Bradbury is an unreasonable, arbitrary and unjustified act on the part of said High School Board against complainants and patrons of said Acme school."

Again complainants aver:

"That they are under the law entitled to have a school maintained at said Acme schoolhouse, the teachers of which shall be paid out of the public school funds and they aver that, unless the defendants are enjoined from so doing, they will abandon said schoolhouse, as a place for maintaining a public school, and that the defendant W. H. Waller, the purchaser of said schoolhouse, may tear down and destroy the same or dispose of same or put said building to uses other than school purposes for which it was built."

This is about as strong a statement of fact as is contained in the bill as the Court views it.

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In the case of *Drake v. Hagan*, reported in 108 Tenn., 24 Pickle, page 265, the declaration alleged that the defendant Hagan, as real estate agent, had charge of a house and lot belonging to his co-defendant, Mrs. C. H. Hagan, leasing the same to tenants and collecting rents; and that it was the duty of both the defendants to keep the premises in good repair and in safe and habitable condition, and notify tenants of defective and dangerous places on the premises; that a certain drain or sewer covered with planks was out of repair on the premises; that defendants knew, or by reasonable care could have known, of said defect, and concealed the same from plaintiffs when they moved into the premises, and failed to notify them of the same at that time or afterwards; that the plaintiff Emma Drake, fell into the drain in consequence of its defective condition and sustained personal injuries.

The defendant demurred to this declaration on the ground that it showed on its face that Hagan, the defendant, leased the premises to plaintiff as an agent, and the bill failed to state any facts showing it to be the duty of defendant, as agent, to keep said premises in repair, or to point out defects therein to tenants; that while the declaration alleged the duty of the agent to keep the premises in repair, to point out dangerous places to tenants, yet this was merely the statement of a legal conclusion, and no facts were stated in the declaration charging the defendant with any such duty, and, at most, the facts stated simply charged the agent with nonfeasance, and not misfeasance or malfeasance. The Court in this case held that the demurrer was well taken and sustained same and dismissed the bill.

The holding of the Court in that case was that it is the well-settled rule under the authorities, that it is not sufficient to charge generally that it was the defendant's duty

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to do the things alleged to have been omitted, or to omit the things alleged to have been done, but that the *facts or circumstances* from which the law will imply the duty must be stated in order to constitute sufficient averment to avoid demurrer, and this rule is adhered to in *White v. Railroad*, 108 Tenn., 24 Pickle, 739. A like rule is announced in the case of *State ex rel. v. University*, 115 Tenn., 7 Cates, 256; also in *Noel v. Eastern Power Co.*, 130 Tenn., 3 Thomp., p. 245.

The last was a case involving the question of the right of eminent domain in one of its phases. The petition asserted that the Power Company was engaged in a work of internal improvement. This averment was general, no facts were set out to justify or base it upon, and it was held to be insufficient.

Under the rule announced in the more recent holdings of the Supreme Court we think the averments of fact in the bill in this case are insufficient.

This school board, defendants in this case, was composed of officials acting under authority of the Acts of the Legislature of Tennessee, Chapter 236 of the Acts of 1907, and Chapter 4 of the Acts of 1913, amendatory thereof. Subsection 4 of Section 10 of Chapter 236 of the Acts of 1907 enumerates some of the powers and duties of the Board in these words:

"To locate schools where deemed most convenient, having due regard for lessening the number in order to improve the efficiency of the county system of education. Pupils may be permitted by the County Board of Education to attend school in a district other than that in which they reside if more convenient, and they may be permitted to attend in another county, than that of their residence if more convenient; provided, it be by agreement of the County Board of Education of both counties."

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Subsection 9 of Section 10 of this Act continues this enumeration in these words:

"To take care or, manage, and control all school property; buy, transfer, or sell school property; and make and take proper conveyances and perform all duties now required of District Directors under Section 70 of Chapter 25 of Acts of 1873, and Chapter 44 of Acts of 1859-60, which may not be included in the foregoing subsection."

Sections 1 and 2 of Chapter 4 of the Acts of 1913 are in these words:

"That whenever it shall appear to the County Board of Education, or the County High School Board of Education in any county of the State, that the efficiency of the public schools would be improved thereby, said Boards of Education shall have full power, and are hereby granted authority to consolidate two or more schools."

"That whenever, by reason of such consolidation, a sufficient number of children is situated too far away from such schools to attend without transportation, said Boards of Education are hereby authorized and empowered to make provisions for the transportation of said pupils that reside too far away from said school to attend without transportation, and to pay for same out of the respective public school funds of the county in which such children reside."

These acts are both entitled Acts to improve the public school system of Tennessee, by creating in each county a County Board of Education and District Advisory Board and prescribing their duties and authorizing the Boards of Education to consolidate schools and provide for the public transportation of pupils, etc.

It is manifest to the Court, from the purpose as expressed in the caption and tenor of these Acts, that the

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Legislature had in mind and purpose in their enactment the taking of the school question in counties out of the general county authority, and vesting same in this specific Board created for the purpose and charged with the duty of the management of the public schools of the counties. It was manifestly the Legislative idea that in order to accomplish this end these Boards should have and be given a large discretion and ample authority to accomplish best results, and the Legislature, dealing with this question of the education of the masses and recognizing its importance, so shaped the legislation as that in its legislative judgment the Board should be unhampered to a large, if not the largest, degree.

This Court can see nothing in the averments of the bill, in so far as the facts stated therein are concerned, that goes further than an effort to thwart the discretionary powers vested in the Board, and no facts are stated based upon which a conclusion can be reached that the discretion and power in the Board under the acts of the Legislature has been violated. We therefore think that the learned Special Chancellor who tried this case below committed no error in his decree sustaining the demurrer to the bill. Accordingly it is affirmed, with costs.

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W. F. TAYLOR v. EDWIN A. TAYLOR,
and
MRS. GEORGIA B. TAYLOR v. EDWIN A. TAYLOR ET AL.

Writ of certiorari denied by the supreme Court, 1915.

1. CONSOLIDATION OF CAUSES. *Divorce case.*

It is not error for a Chancellor to order consolidation of a divorce case and an independent case involving property out of which the wife is seeking alimony.

2. FRAUDULENT CONVEYANCE. *Alimony. Wife as creditor.*

A wife seeking a divorce and alimony is a creditor of her husband and may attack as fraudulent any conveyance of her husband which embarrasses her claims.

3. SAME. *Conveyance by married son to father after separation from wife. Burden of proof.*

The burden is upon the father to whom a son separated from his wife has conveyed all of his property, to show that the conveyance was free from fraud and for a valid consideration where there are developed circumstances which assail the *bona fides* of the transaction.

4. SAME. *Acceptance of deed to property after knowledge of settlement upon the deserted wife.*

A conveyance by a son to the father of all of his property after deserting his wife and settling property upon her by oral agreement may be adjudged fraudulent where the father knew of the separation and settlement upon the wife and her occupancy of the premises.

5. DIVORCE. *Grounds of. Agreement as to. Alimony.*

A wife who takes possession of the property of her husband under an agreement with him to file a bill for divorce upon the ground of desertion in two years, is not precluded from filing a bill upon the ground of adultery as an additional

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ground, where she subsequently discovers the adultery of her husband; nor will her alleged violation of agreement affect her claim for alimony.

6. ESTOPPEL. *Pleading and practice.*

While estoppel must be especially pleaded, it need not be set forth *haec verba* in equity. It is sufficient if the facts calling for the application of the doctrine be clearly set forth.

7. DIVORCE. *Appeal. Absence of bill of exceptions.*

A decree of divorce pronounced by the lower Court upon oral testimony will be presumed to have been supported by the evidence when there is no bill of exceptions.

FROM SHELBY COUNTY.

Appeal from the Chancery Court of Shelby County,
Part I. F. H. HEISKELL, Chancellor.

WILSON & ARMSTRONG for Complainant, Mrs. Georgia B. Taylor.

G. J. McSPADDEN for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

In the first of these causes complainant asked for sale for division of a house and lot on East Moreland Avenue, in the city of Memphis, and for the recovery of some hundred or more articles of personal property averred to be in the house aforesaid and unlawfully detained by Mrs. Georgia B. Taylor. The second controversy is properly characterized as a suit for divorce and alimony brought by Mrs. Taylor against her husband and his father. In both proceedings the validity of a certain conveyance of

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the realty and a bill of sale of the personalty executed in January, 1913, is involved.

Both causes were heard together by a consolidation order. The action of the Chancellor in determining the matters in one hearing is criticized by learned counsel for W. F. Taylor, but we wish to commend the Court for having done so, notwithstanding one was for a divorce and the other was for the recovery of property.

The Chancellor granted Mrs. Taylor an absolute divorce from her husband, upon the grounds of desertion and adultery; and also allowed her the property above involved as alimony. The husband is not prosecuting any appeal from the divorce proceedings. Something was said about there being no evidence of adultery in the record. This we are persuaded will have to be admitted for reasons hereinafter stated. But this avails the Taylors nothing, owing to the rule of procedure which requires us to presume that the Chancellor was warranted by the evidence heard by him in pronouncing the husband guilty of adultery and of wilful desertion.

The suit of the father was instituted in May, 1913. He averred that he was the owner by deed and purchase of the house and lot in question, his son having conveyed it to him by deed in which Mrs. Taylor did not join; and that Mrs. Taylor was entitled to homestead therein; and that as the property was worth more than \$1,000 a sale would be necessary to the realization of the rights of himself and Mrs. Taylor. This complainant also alleged his ownership of the personal property designated in an accompanying schedule. Mrs. Taylor filed an answer and cross bill, in which she averred that her husband had wilfully and maliciously deserted her and had committed adultery; that he had abandoned her in June, 1911, at which time he had entered into an agreement with her to allow her \$75.00 per

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month for a period of two years, and also agreed that she might have the use and occupancy of the house involved during that time and also its contents, with the further stipulation and understanding that at the end of two years and upon the securing by her of a divorce, he would give her the contents and deed her the house absolutely. She alleged that W. F. Taylor was aware of this arrangement and knew of her claim, but notwithstanding this he entered into an agreement or conspiracy with his son to defeat and defraud her of her rights under the stipulation with her husband, and also to embarrass her in the enforcement of her claims for alimony. She also asserted that the personal property was her separate estate. Her prayer was that the conveyances be adjudged fraudulent and void and that she be declared the owner of the property or that it be set apart to her as alimony.

The Chancellor granted her prayer, except that he declined to allow her any monthly sums and required her to pay her attorney's fees and costs.

W. F. Taylor alone excepted and perfected an appeal. Numerous errors are assigned; and, while the questions presented are interesting, they need brief treatment only.

The first assignment is to the effect that the Chancellor was in error in setting aside the conveyances as fraudulent, on account of the insufficiency of the allegations of Mrs. Taylor's pleadings to justify such decree. It is certainly true that fraud must be averred with particularity, and that the allegations must be supported by proof, and that a decree without allegations of facts is absolutely void. These rules are so often announced as to become current coin without the stamp of authorities. But we are convinced that cross complainant was particular enough in her allegations to raise the questions of fraud and to call for a decree thereon. She distinctly averred that appellant was

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fully aware of the arrangement between her husband and herself and assented thereto; that he also knew that she was entitled to support and maintenance from her husband, and that the property in question constituted the whole of her husband's property; and she in this connection alleged that complainant and her husband entered into the contracts in question designedly and for the purpose of defrauding her of her rights in the premises. These were allegations of fact, and if sustained entitled her to a decree adjudging the instruments void. We overrule the first assignment of error.

In the second specification appellant contends that the Chancellor was in error in holding that the Taylors were guilty of such fraud toward Mrs. Taylor as rendered the instruments void. After careful consideration we have reached the conclusion that no other inference can be drawn from the premises. It is not what the parties assert they intended, but rather the reasonable and logical interpretation of their acts, that is the subject of inquiry. Again, these parties must be presumed to have intended the ordinary consequences of their doings. The inevitable result of the upholding of these conveyances would be to leave Mrs. Taylor a divorced and abandoned woman, without one cent in the world and with no hope of any aid from a husband who is a deliberate deserter from his post of duty. W. F. Taylor accepted a conveyance of the house with knowledge of a virtual settlement thereof upon the wife by the husband. (For we find by preponderance of the evidence that he was informed shortly after the separation in June, 1911, of the arrangement whereby the wife was to have the property.) He also knew at the time he accepted the pawnshop and second-hand furniture dealer's list as it were of the contents of the house, that his son was selling to him property which every man of proper concep-

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tions would have known belonged to the wife solely or at least jointly with the husband. Appellant was also aware that his son never intended to live with his wife again, and never intended to make any provision for her. Protestations of innocence are under these circumstances unavailing; and we concur with the Chancellor in imputing a fraudulent intent to appellant and his son such as avoids these instruments.

The wife was a creditor. She had a claim against her husband that was entitled to the utmost consideration at the hands of her husband and his father. Any conveyance the effect of which embarrasses her in the realization of her claim is fraudulent. *Brooks v. Caughran*, 3 Head, 465; *Nix v. Nix*, 10 Heis., 548; see notes to *Fahey v. Fahey*, 19 L. R. A. (N. S.), 1148 and notes.

But it is earnestly contended that these conveyances were made to reimburse Col. Taylor for large sums of money which he had previously paid out for his son, and that the conveyances were taken in payment of *bona fide* debts existing prior to and at the time of the suit for divorce and alimony. It is admitted that creditors may take conveyances from their debtors to the exclusion of other creditors; it is also conceded that the claims of creditors are superior to those of the wife for alimony. But we are of opinion that the equities of the wife in the instant case are superior to the legal rights of W. F. Taylor, and that the well established rules mentioned will have to yield to these exceptional circumstances.

A father may undoubtedly accept a conveyance from his son, but when the deed is challenged by a party having a strong equity, and when there are a few circumstances of suspicion, the burden is on the grantee to show that the contract was made in good faith and that the transaction was not tainted with fraud: *Robinson v. Frankel*, 85

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Tenn., 475. We are persuaded that all of these obligations, treating them as genuine, were created some five or six months prior to the conveyance of January, 1913; and the attempt to show that they were in renewal of previous obligations fails. We are convinced by the greater weight of the evidence that not one of these debts was in existence before or at the time of the separation of young Taylor and his wife.

The husband abandoned the wife in June, 1911, and turned over all the property to her, and permitted her to occupy the same under a claim of right from the separation to the date of the conveyance. The father knew that she was in possession under a claim of right. Drawing upon the laws of champerty for analogy, and resorting to the law of estoppel for aid, we are of opinion that these subsequent debts of W. F. Taylor should be held fraudulent and he as illegal vendee, or as not in position to assert any after acquired interest in antagonism to the right and equities of Mrs. Taylor. Being of the opinion that these debts are and were subsequent to the date of settlement, we can omit discussion of the consequences had the son been as a matter of fact largely indebted to the father on the day of the separation. But we are not to be understood as deciding that estoppel might not be availing as against prior indebtedness. For it must not be overlooked that Mrs. Taylor ceased annoying her husband, and consented with the greatest sacrifice to live apart from him and let him pursue his own career of license without let or interference, all the while resting in the belief that though she would thereafter be a divorced woman, she would in her own right be the owner of a shelter in which she might spend her widowhood. And this was known fully to W. F. Taylor.

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It is urged that the rights arising from estoppel are not claimed by Mrs. Taylor in her bill. She averred the facts and prayed for general relief, and this was a sufficient call upon the Court of equity to apply the beneficent doctrine of estoppel affirmatively. The principles of this head of equity are protean, and are to be extended whenever and wherever their application will be promotive or protective of rights and equities.

In the fourth assignment it is asserted that the Chancellor was in error in holding that Mrs. Taylor and her husband entered into an agreement at the time of the separation whereby she was to be given the house and contents at the end of two years. As before intimated, we are of opinion that this agreement was entered into. It seems that the agreement was that she was to remain in the house during two years and then file her bill for divorce upon the ground of desertion. This matter has given us some concern, because of the fact that when she did file her bill for divorce she supplemented her charge of abandonment with that of adultery. But we have reached the conclusion that this should not be treated as so material as to forfeit her equities.

In the first place, the stipulation was made in ignorance of the faithless life and conduct of her husband. Secondly, Mrs. Taylor is not to be censured for bringing this charge forward after her discovery of his conduct and his dealings with his paramour. It may have impressed her as an effectual means of securing alimony.

But what we do find as a fact is that the husband promised her to give her this house and its contents whenever she should secure a divorce, and that she has lived up to her part of the agreement, laying aside for the present the fact that she relied upon adultery as one of the grounds.

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In the sixth assignment it is said that the Chancellor should not have given Mrs. Taylor all the property of her husband by way of alimony, citing *Toncray v. Toncray*, 123 Tenn., 495. We are of opinion that when all the foregoing is considered the Chancellor was not in error in decreeing to her the whole of the property. It is true that claims of this kind seldom exceed one-half the husband's property. But when it is recalled that he had settled the whole upon her and that he had abandoned her without any just cause whatever and that he treated her with extreme neglect; further, when it is considered that he is young and well connected, and son of a wealthy man, with an expectancy of substantial proportions from a fond parent; and, further, when it is recalled that virtually every piece of personal property belonged to the wife as gifts from husband and friends as wedding, birthday and anniversary presents, we are not going to disturb the action of the Chancellor in giving her all of it. The Chancellor adjudged that she pay her own attorney's fees and that she be denied any specific money allowance and that she pay all the costs. She has not appealed from this. So that she will be obligated to pay all the Court costs incurred in the two causes in the Court below and her property will be onerated therewith.

It results from the foregoing that the decree of the Chancellor adjudging the conveyances void and vesting Mrs. Taylor therewith is in all respects affirmed, and that all assignments of error of W. F. Taylor stand overruled. He will pay the costs of the appeal, except that Mrs. Taylor will be required to pay the costs of copying into the record the following depositions: Those of Carlton, Morgan, Stephens, Minor, Yates, Gusdofer, O'Neal and Mrs. Hud-

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son. The Court sustains the motion of appellant to strike these. That they were not made parts of the record by bill of exception after they were excluded by the lower Court.

MASILLON ENGINE COMPANY V. J. M. SHOEMAKER ET AL.

Affirmed by Supreme Court, 1916.

1. **HUSBAND AND WIFE.** *Wife's choses in action. Proceeds of land jointly held. Reduction to possession.*

Whether the husband has reduced the wife's choses in action to his possession so as to become entitled to the proceeds is a question of intention. He may have manual possession and yet not be owner. A husband who enters into an agreement with his wife that a certain proportion of the proceeds of land in which she claims an interest and which are about to be sold shall be set apart for her, becomes her trustee therefor.

2. **SAME.** *Agreement between husband and wife as to division of land proceeds.*

A husband and wife who jointly own lands may enter into an agreement to divide the proceeds, and both the husband and his creditors are bound by such agreement.

FROM WASHINGTON COUNTY.

Appeal from the Chancery Court of Washington County.
A. N. SHOUN, Special Chancellor.

Engine Co. v. Shoemaker.

THAD A. COX for Complainant.

HASKELL H. DYER for Defendants.

SPECIAL JUSTICE JOHN W. GREEN delivered the opinion of the Court.

THIS is a suit brought by the Massillon Engine & Thresher Company in the Chancery Court at Johnson City against J. M. Shoemaker and others for the purpose of collecting an indebtedness due from Shoemaker for machinery, and setting aside a deed to lands in Washington County standing in the name of Shoemaker's daughter. There was a decree against Shoemaker for \$2,176.71 as to which there is no complaint in this Court, and the controversy now relates solely to the land which the complainant seeks to reach by attachment for the satisfaction of its debt.

There is no dispute about the facts of the case which are brief and are as follows: J. M. Shoemaker and his wife, Nannie Shoemaker, who had owned since 1883, as tenants by the entirety a tract of land in Sullivan County, sold and conveyed it to one A. N. Bridewell for the cash consideration of \$2,500.00. Bridewell's check for the \$2,500.00 payable to J. M. Shoemaker was taken by Shoemaker in person to the bank at Blountville, Tennessee, and cashed. He kept \$1,250.00 of the money himself and turned the other half over in currency to his wife. Mrs. Shoemaker turned her \$1,250.00 over to her daughter, Rachael Shoemaker, who, after adding \$250.00 of her own money thereto, took out a certificate of deposit for the \$1,500.00 in her (Rachael Shoemaker's) name. J. M. Shoemaker used the \$1,250.00 he retained for the payment of his debts, \$450.00 of it being paid to complainant in partial settlement of its machinery debt. It appears from the record that the Sullivan County land which Shoemaker

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and wife held by entireties had been paid for in part by money received by Mrs. Shoemaker from her father's estate. A short time after the sale of the Sullivan County land, Rachael Shoemaker invested the \$1,500.00, representing her mother's \$1,250.00 and her own \$250.00 in a farm in Washington County, taking the title thereto in her own name, and this is the land which complainant has attached and seeks to subject to the satisfaction of its debt on the ground that the taking of the title in her name was a fraud upon complainant's rights to the extent in any event of the \$1,250.00 she got from her mother.

It should be stated in this connection that the indebtedness sued on was in existence at the time the Sullivan County farm was sold, and it is quite probable that both the wife and daughter of Shoemaker then knew of his financial difficulties.

Shoemaker and daughter both came to Washington County to examine the farm, which complainant has attached, and while it does not appear who actually conducted the negotiations leading to its acquisition, there is nothing to show that the certificate of deposit or money which was used in paying for it was ever out of the daughter's possession after the sale of the Sullivan County farm until it was delivered in payment for the Washington County farm. It is claimed on behalf of complainant that the money invested in the Washington County farm had been reduced to Shoemaker's possession and was his money, and that the farm therefore is his and is subject to his debt. We cannot assent to this proposition. A husband may actually have his wife's chose in his manual possession, without reducing it to possession within the meaning of the law. Whether he did so or not is a question of intention. If he intended his acts to have that effect, there would be some force in complainant's contention, but the proof is entirely

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to the contrary. He not only carefully refrained from exercising any act of ownership over said certificate or funds, but on the contrary he immediately and continuously after receiving the same recognized his wife's rights and ownership.

"Whether an act of the husband in converting a chose in action of the wife is a reduction into his possession depends upon his intention. If he actually collects the money but only as the agent of the wife, and invests in property for her benefit, the property will belong to the wife, even against the husband's creditors although the title is taken in the husband, . . . and the fact that the husband assents to what is done is sufficient to uphold the right of the wife exclusive of the idea of reduction into possession by him without proof of express purpose on his part." *McC Campbell v. McC Campbell*, 2 Lea, 661, 663.

While the Sullivan County farm, so long as the title remained in the name of Shoemaker and wife, was undoubtedly an estate by the entirety, and as such the contingent interest of the husband therein subject to his debts, we think upon its conversion into money the husband and wife might agree upon a division of the money. The complainant had fixed no lien upon the land before its sale, and the wife having been at the time of the sale emancipated by the married woman's act of 1913, had the legal right to contract with her husband as to the basis of division. The agreement was that each should take one-half and we know of no rule of law which this division contravenes and think it was fair as between the parties and free from fraud as to creditors. Shoemaker applied \$450.00 of his one-half on complainant's debt, and the remainder of his one-half upon his other liabilities, thereby evincing an honest purpose and negating the charge of fraud.

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In the case of *Jackson v. Shelton*, 89 Tenn., 82, it was held that where a husband and wife were tenants by entireties of a tract of land, that the wife could assert her right of homestead in such land or its proceeds after divorce, against the husband's creditors. The complainant must, of course, show fraud, actual or constructive, before it can claim relief, and we think it has failed to do so. It has actually gotten \$450.00 in money out of the proceeds of the sale of the tract of land voluntarily made by the husband and wife, whereas an involuntary sale under legal compulsion must have been subject to the homestead rights and subject to the possibility of the wife surviving the husband, which would most seriously have handicapped its selling qualities.

We do not think it material that a portion of the original purchase money with which the Sullivan County land was acquired in 1883 belonged to Mrs. Shoemaker. Her rights in the proceeds of the sale of said land would not be affected by this circumstance. If she had contributed nothing at all to the purchase money she would have the same interest as tenant by the entirety in the proceeds of the sale as if she had contributed all the purchase money. It necessarily follows from the holding that the wife had the right to one-half of said proceeds, that the Washington County land purchased with said proceeds was not an estate by the entirety and was in no contingency subject to complainant's debt.

The Court below held that there was no fraud in the transaction and that the land was not subject to attachment or sale for J. M. Shoemaker's debt. There is no error in the decree and it is affirmed with costs.

Wood v. Business Men's Club.

W. B. WOOD, ADM'R, v. BUSINESS MEN'S CLUB.

Affirmed by Supreme Court, 1916.

CHARITIES. *Negligence, exemption from. Special plea.*

A corporation which intends to defend an action for negligence upon the ground that it is a charity must do so by special plea.

FROM SHELBY COUNTY.

Appeal in error from Third Circuit Court of Shelby County. A. B. PITTMAN, Judge.

LINDSEY B. PHILLIPS for Plaintiff in Error.

WILSON & ARMSTRONG for Defendant in Error.

SPECIAL JUSTICE V. H. HOLMES delivered the opinion of the Court.

THIS is an action to recover damages for the death of plaintiff's intestate, Hattie Lott. The plaintiff has appealed, and assigns as error the action of the trial Judge in directing a verdict for the defendant.

The declaration charges the defendant with negligence in several particulars, but at the trial every charge of negligence was abandoned, except the charge that defendant was guilty of negligence in employing and keeping in its employ one Walter Jenkins, it being alleged that his incompetency was the cause of the accident, which resulted in the death of Hattie Lott.

The defendant pleaded not guilty, and the usual plea of contributory negligence. Another ground of defense

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was raised during the trial, and is insisted upon in this Court; that is, that the defendant is a public charity. We deem it unnecessary to determine whether or not the defendant is a public charity. There was no plea setting up this defense, and we think it cannot be relied upon in the absence of such a plea.

This matter out of the way, it is conceded that if the accident were due to the incompetency of Walter Jenkins, and that his incompetency was known or should have been known to defendant, then the defendant is liable, unless the negligence of Hattie Lott proximately contributed to the injury.

So that under the assignment of error it becomes necessary to determine whether there is any material evidence tending to show three propositions of fact:

(1) That Walter Jenkins was incompetent to perform the duties assigned to him.

(2) That his incompetency was known or should have been known to defendant.

(3) That the accident was due to his incompetency.

If there were any material evidence tending to establish each of the three propositions, then the case should have been submitted to the jury.

A majority of the Court are of opinion that there was sufficient evidence tending to show (1) that Walter Jenkins was incompetent to operate the elevator; (2) that the incompetency of Walter Jenkins was shown to defendant; (3) that the negligence of Walter Jenkins was the proximate cause of the accident, to carry the car to the jury. At best, the question of contributory negligence on the part of plaintiff's intestate was a question for the jury.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial. The costs of the appeal will be taxed to defendant in error.

Walton v. Insurance Co.

EDITH WALTON V. GERMANIA INSURANCE CO.

Affirmed by Supreme Court, 1910.

FIRE INSURANCE. *Policy issued in another name than that of true owner.*

A declaration setting forth that an insurance policy upon which suit was brought was issued in the name of E. W., but intended to be for and on behalf of J. M., who was the real owner of the property and so understood at the time, is not subject to demurrer which urges that suit can be brought upon an insurance policy in no other name than that given in the contract.

FROM SHELBY COUNTY.

Appeal in error from Circuit Court of Shelby County,
Part I. J. P. YOUNG, Judge.

BELL, TERRY & BELL for Plaintiff in Error.

R. L. BARTELS for Defendant in Error.

SPECIAL JUSTICE HOLMES delivered the opinion of the Court.

THIS is an action to recover on a fire insurance policy. The Circuit Judge sustained a demurrer to the declaration, and dismissed the suit. The plaintiff in the declaration has appealed to this Court, and assigned error.

The declaration avers, in substance, that plaintiff is commonly known and called by the name of Mrs. J. Murray as well as Edith Walton; that the policy of insurance

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was issued to her in the name of Mrs. J. Murray. She sues in this case as Mrs. Edith Walton.

The only real question raised by the demurrer, and now before this Court is whether the plaintiff suing as Edith Walton on an insurance policy made to Mrs. J. Murray could maintain her action in a Court of law before having the contract reformed in a Court of equity.

The plaintiff insists that the rule is that where an instrument, by accident, mistake or design, is made payable to a person by a wrong name, it is not necessary to go into a Court of equity to have the instrument reformed, but the obligee may sue thereon in his true name, averring that the instrument was made to him in and by the name therein appearing. To sustain this proposition plaintiff cites one hundred or more cases, some of which we have not had time to read. Among the cases cited by plaintiff is *Trustee v. Reamear*, 2 Swan, 94.

The defendant relies upon three propositions:

(1) That a written contract, unambiguous in its terms, plain and clear in its meaning, is to be treated as the final agreement of the parties, not to be waived or altered by understandings, agreements, or declarations made prior to or contemporaneous with the consummation of such contract. (Citing Wigmore on Evidence, Vol. 4, section 240; *Woodbury Savings Bank & Building Association v. The Charter Oak Fire & Marine Insurance Co.*, 29 Conn., 374; *Finney v. Insurance Co.*, 8 Metcalf, 348.)

There can be no doubt as to the soundness of this proposition in general.

(2) When it is claimed that a contract as written does not express the agreement of the parties, whether as the result of mutual mistakes, or the result of fraud, the remedy of the party claiming is in a Court of equity to invoke

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the doctrine of reformation. (Citing *Schmidt v. Insurance Co.*, 37 S. W., 1013; *Helms v. Wright*, 2 Hum., 72; *Cromwell v. Winchester*, 2 Head, 389.)

The correctness of this proposition may be conceded.

(3) That a fire insurance contract is one of personal indemnity; and that the party insured is as material to the risk as the location or subject matter thereof. (Citing *Quarles v. Clayton*, 87 Tenn., 308; *Laundry Co. v. Insurance Co.*, 121 Tenn., 313.)

As above stated, we have not read all of the cases cited by plaintiff. However, we think we have read a sufficient number of them to have some understanding of the principles upon which they were decided, and in the light of that understanding, we are of the opinion that the declaration in this case is not obnoxious to any of the principles announced in the cases cited by defendant in error.

First: That to sustain the averments of the declaration it will become necessary to vary or alter the insurance policy, which is the final agreement of the parties. The declaration shows, on its face, that no such course will be necessary. It is not averred that the contract was made with any person other than the person intended nor other than the person who sues. It is true the declaration avers that in the contract Edith Walton is called Mrs. J. Murray, but it is averred, and by the demurrer admitted, that Mrs. J. Murray and Edith Walton are one and the same person. So that it is averred and admitted that the contract was *intended* to be made with Edith Walton; that it *was* made with Edith Walton, and that it *is* Edith Walton who seeks to enforce the contract. Certainly this is no offer to vary by parol the terms of a written contract.

Second: The declaration makes no claim that the insurance policy does not express the agreement of the par-

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ties. It is averred in the declaration, and by the demurrer admitted, that Edith Walton and Mrs. J. Murray are one and the same person. So that it is averred that the final agreement of the parties was to indemnify Edith Walton against loss by fire. Certainly there is no need to invoke the aid of a Court of equity to reform a contract which it is averred and admitted expresses the agreement of the parties.

Third: Assuming that a fire insurance contract is one of personal indemnity, and that the party insured is as material to the risk as the location or subject matter of the insurance. The declaration in this case avers no change of ownership; alleges no substitution of one individual for another, but avers that the person claiming under the contract is the identical person whom the insurance company *accepted*; whom it *intended* to and *did* indemnify. Under this declaration it will never be necessary to insist that the contract was or is other than one of person indemnity.

We are of the opinion that the declaration in this case is not obnoxious to any principle of law and violates no rule of pleading; and that it sufficiently states a good cause of action.

The assignment of error is sustained; the judgment of the Circuit Court is reversed, and the case remanded for further proceedings. The defendant in error will pay the costs of the appeal.

Peterson v. Goudge.

NOAH PETERSON v. NELLIE GOUDGE.

Affirmed by Supreme Court, 1916.

1. **HOMESTEAD.** *Abandonment. None where control retained although party remove from State.*

A widow who is entitled to homestead allotment does not lose her right although removing from the State if she retain control of the premises by tenant or otherwise.

2. **HOMESTEAD AND DOWER.** *Forfeiture thereof by adultery committed subsequently to death of husband.*

A widow entitled to homestead and dower does not forfeit her right thereto by an adulterous life begun subsequently to the death of her husband.

3. **JUDGMENT OF COUNTY COURT.** *Collateral attack.*

A party cannot by bill in the Chancery Court attack a decree of the County Court in allotting homestead and dower upon the ground that the amount allowed was excessive.

FROM UNICOI COUNTY.

Appeal from the Chancery Court of Unicoi County.
HAL H. HAYNES, Chancellor.

S. E. N. MOORE for Complainant.

HARR & BURROW for Defendant.

JAS. B. COX, Guardian ad litem.

SPECIAL JUSTICE JOHN W. GREEN, sitting during the disability of Justice Hughes, delivered the opinion of the Court.

Peterson v. Goudge.

THIS is a suit brought in the Chancery Court of Unicoi County, by the heirs of James Peterson, against his widow and others for the twofold purpose of selling for partition the lands of which he died seized and possessed, and to set aside the allotment of homestead and dower made by the County Court to the widow on the ground that she had removed from the State and thereby abandoned and forfeited her marital rights. It is further claimed by the complainants that the widow had also by reason of her immoral conduct, lost her rights, and finally, that in any event, the allotment as made by the commissioners appointed by the County Court was excessive. These several questions while not all squarely raised by the pleadings are partially so and are fully raised by the proof. There was a demurrer to the bill which the Chancellor properly overruled and the case progressed to answer, testimony and final decree. On the final hearing, all the contentions made by the complainants, except the right to sell for partition were decided adversely to them, and they and the minor defendants through their guardian ad litem have appealed and assigned errors, opening up the entire case.

The facts of the case are that James Peterson died intestate at his home in Unicoi County, on October 9, 1911, leaving no children or descendants of children, but leaving a widow, Nellie Peterson, who about ten months thereafter married her co-defendant, Robert Goudge. The heirs at law of the decedent were his brothers and sisters. The widow was not living with her husband at the time of his death, but was in Knoxville. It appears that he was a drinking man, and that his wife had brought one or more divorce suits against him, which, however, had never come to trial and that their relations were most unhappy. On November 21, 1911, commissioners duly appointed for that purpose by the County Court of Unicoi County, set apart

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by proper report homestead, dower and year's support to Mrs. Peterson, to which report there was neither exception nor appeal. On July 4, 1912, thereafter, she and her co-defendant, Robert Goudge, were married. At that time he was depot agent at Unicoi, of the C., C. & O. R. R., and had occupied this position for three years. After the marriage they lived in Knoxville for about six months, when they went to Johnson City and remained there for about a year, and then the couple moved to Ft. Blackmore, Va., where they resided at the time this suit was brought. The defendant, Nellie Goudge, stated in a letter written after the first husband's death that she did not want to live in Unicoi County, and the weight of the proof fairly establishes the fact that she had abandoned her home in Tennessee and that she and her second husband had taken up their residence in the State of Virginia. Both she and her second husband, however, still retained some articles of personal property in Unicoi County. She has never sold her homestead and dower, but from the time of the allotment has continued to rent the same, at first at the rate of ten dollars per month, and later and at the time of the bringing and pendency of the suit at seven dollars per month.

The proof establishes the fact that the commissioners who set apart the homestead and dower were competent and duly qualified, and that their action was characterized by sound judgment and good faith. The proof falls far short of establishing the fact that Mrs. Peterson was an unfaithful and unchaste wife to James Peterson. There were divorce proceedings between the two, it is true, but she and not he was the actor therein. There appears to have been some rumors during her first husband's life affecting her good name, but they were mere rumors. It is also true that she gave birth to a child four months after

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her marriage to her second husband and fourteen months after the death of her first husband. Doubtless the second husband was the father of the child.

We find the law applicable to the facts of the case as above detailed to be as follows:

Where a homestead in this State is leased and the owners of the homestead afterwards remove and terminate their residence and citizenship in this State and acquire a residence and citizenship in another State, the homestead is not thereby forfeited. *Beeler v. Nance*, 126 Tenn., 589, 592-598. Conceding, therefore, to complainant's evidence everything that can be claimed for it upon the question of abandoning the Tennessee home and removing to and acquiring a home in the State of Virginia, they would still be precluded by this decision from recovery. See, also, *Briscoe v. Vaughn*, 103 Tenn., 308; *Coile v. Hudgins*, 109 Tenn., 223; *Cowan v. Carson*, 101 Tenn., 526, all of which are discussed and reviewed in the case of *Beeler v. Nance*, *supra*.

It is next claimed that even if the widow is entitled to homestead, the allowance of the commissioners is too liberal and is excessive and out of proportion to the value of the estate. We find the facts upon this point against the complainants, as we have already indicated, but even if they were otherwise, the judgment of the County Court could not be reversed or drawn in question in this proceeding.

Finally, it is contended that the defendant, Nellie Goudge, forfeited her marital rights by her misconduct. There is no proof of misconduct prior to her husband's death. If there were, under the authorities, complainants would clearly be entitled to relief, but we know of no law, and counsel have not cited us to any, which justifies us in

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holding that the misconduct of a widow after the husband's death and after homestead and dower have been set apart to her works a forfeiture of her marital rights. It is true, the proof shows that she had a child by Robert Goudge within four months after their marriage and that they were married about ten months after the death of her first husband, but if immorality taking place a few months after the husband's decease can be held to forfeit the widow's rights, it would be just as logical to hold that immorality occurring five, ten, or more years afterward would have the same effect. Upon the whole case we therefore hold that complainants are not entitled to any relief as against the widow, the defendant Nellie Goudge. They are manifestly entitled to relief in so far as the bill seeks a sale for partition, but such sale will be made subject to the homestead and dower rights of the defendant, Nellie Goudge, as declared and adjudged by the County Court of Unicoi County. The Chancellor so held and his decree is in all respects affirmed. The costs incident to the appeal are adjudged against complainants and their sureties, and the cause will be remanded to the Chancery Court for further proceedings.

Railroad Co. v. Toombs.

I. C. R. R. Co. v. YOUREE TOOMBS.

Affirmed by Supreme Court, 1915.

1. **MASTER AND SERVANT.** *Railway as employer. Liability for wanton use of engine whistle.*

A railway company whose servants while in charge of an engine standing near a highway uselessly and wantonly blow the whistle for the purpose of frightening the team of a passerby and cause the team to take fright, run away and injure the driver, is liable in damages.

2. **SAME.** *Scope of employment and apparent scope. Special requests.*

A master is liable for all acts done by his servant within the apparent scope of his employment; and a special request to the effect that the master would not be liable unless the act would be within the scope of the servant's employment is too narrow in that it omits the apparent scope of employment phase.

3. **SPECIAL REQUESTS.** *Advancing theory.*

A Court cannot be put in error for failing to give in charge a special request setting forth a particular theory unless there be facts in evidence tending to support such theory.

4. **INSTRUCTIONS.** *Contributory negligence.*

No Court should instruct the jury that certain facts constitute contributory negligence unless the facts be clearly shown and the conclusion inevitable.

FROM GIBSON COUNTY.

Appeal in error from the Circuit Court of Gibson County. THOS. E. HARWOOD, Judge.

Railroad Co. v. Toombs.

J. P. RHODES for Plaintiff in Error.

LANNOM & STANDFIELD and COOPER & CLARK for Defendant in Error.

SPECIAL JUSTICE HOLMES delivered the opinion of the Court.

YOUREE TOOMBS brought this suit to recover for a personal injury. There was a verdict for \$1,200.00. The railroad company has appealed.

The declaration was in three counts. The counts differ each from the other, in no material matter. The substance of the change in the declaration is that while the plaintiff was driving across the railroad at a public road crossing, an agent of defendant, who then had charge of an engine standing on a side track and near to the crossing, for the purpose of frightening plaintiff's horse, wantonly and unnecessarily sounded the whistle of the engine, thereby causing plaintiff's horse to run away, whereby he was thrown from his wagon and injured.

The defendant pleaded not guilty, and that plaintiff's negligence proximately contributed to the accident.

There are many assignments of error.

The trial Judge instructed the jury that if the agent of defendant in charge of the engine, seeing the position of plaintiff, wantonly and unnecessarily sounded the whistle, and in this way caused the accident, defendant would be liable. And, when so requested by defendant, declined to instruct the jury that before the defendant could be held liable they would have to find that the agent of defendant, in sounding the whistle, was acting within the scope of his employment. The action of the trial Judge in these particulars forms the basis of the third, fourth and fifth assignment of error.

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The general rule of law is that the master is not liable for the tortious or negligent acts of the servant not committed within the scope of his employment. *Puryear v. Thompson*, 5 Hum., 397; *Diehl & Lord v. Ottonville*, 14 Lea, 191; 26 Cyc., p. 1528; *Smith v. Packet Co.*, 3 Shannon, 265. There are exceptions to this general rule, as:

(1) When the master directs, approves or ratifies the tort of the servant. *Bryam v. McGuire*, 3 Head, 530; *Elmore v. Brooks*, 6 Heis., 45.

(2) Where there is some contractual relation between the master and the party injured, as in the case of a passenger on a train or street car. *Transportation Co. v. Smith*, 16 Lea, 501; *Knoxville Traction Co. v. Lane*, 19 Pick., 376; *Railroad v. Ray*, 17 Pick., 1.

We have cases holding that the master is liable where the wrongful act of the servant is done within the apparent scope of his employment, although the act may be in excess of authority and contrary to instructions. *Eichengreen v. Railroad*, 12 Pick., 229; *Payne v. Railroad*, 13 Lea, 513; *Luttrell v. Hazen*, 3 Sneed, 25.

Upon the authority of the cases just cited it is clear that the special instructions requested as set out in assignments of error Nos. 3 and 5 were properly refused because they did not go far enough. These requests asked the trial Judge to instruct the jury that the defendant would not be liable unless the act of sounding the whistle was within the scope of its servant's employment. To this should have been added, or within the apparent scope of his employment. If the agent were employed to run the engine, his authority to sound the whistle, within the scope of his employment strictly limited, may have been to sound the whistle only when it was necessary to give some warning or signal, and to do so then only in a proper manner. But being authorized to sound the whistle at all, if he deem it neces-

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sary to sound the whistle and does so, but in an improper manner, he would be acting within the apparent scope of his employment, and the master would be liable for any injury resulting from the negligent manner of sounding the whistle.

However, in this case the plaintiff's right of recovery is not based on the ground that the wrongful act which caused the accident was done by the servant of defendant while acting within the scope or apparent scope of his employment. The declaration charges and the proof shows that the act of sounding the whistle, which caused the accident, was not done within the actual nor apparent scope of the agent's employment; that it was not done in connection with any business of the railroad company; but that it was done willfully, and for a purpose of the servant wholly disconnected with any unrelated to his master's business.

This case presents squarely the single question, whether a railroad company is liable if its servant, whom it has put in charge of an engine, wantonly uses the engine to serve a purpose entirely his own, and wholly aside from and unrelated to any duty which he owes to his master. It is indisputably proven, and is conceded by both plaintiff and defendant, that it was neither actually nor apparently necessary nor proper to sound the whistle when plaintiff was crossing the track.

The trial Judge instructed the jury that the only question for them to determine was whether the person in charge of the engine unnecessarily sounded the whistle, thereby causing the accident. This instruction is in accord with the principles announced in *Railroad v. Starnes*, 9 Heis., 54. That case concedes the general rule that a master is not liable for the torts of his servant not committed within the scope nor apparent scope of his employ-

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ment. But proceeds upon the theory that this doctrine must be greatly modified in its application to railroad companies on account of the absolute necessity for the application of more stringent rules for the protection of life and property against the perils of the steam engine and its capacity for mischief. And the real underlying principle upon which the railroad company was held liable in the Starnes case is that the engines of the railroad are instrumentalities capable of causing, and very ilable to cause, many and great injuries and much mischief, unless great caution and care is observed in their use, and that by putting such an instrumentality in the hands of a servant, the company consents to be bound by the servant's acts, and should be bound by any use of the dangerous instrumentality by the servant, whether in furtherance of the master's business or to serve the servant's own purpose.

We have been unable to find any reported case in this State applying and following the rule announced in the Starnes case. In the brief for plaintiff counsel cites as sustaining the rule announced in the Starnes case *Dalton v. Kopp*, 2 Higgins, 619; *Mitchell v. Railroad*, 110 Tenn., 329; *Traction Co. v. Mullins*, 111 Tenn., 329; *Stone Co. v. Pugh*, 115 Tenn., 698, and *Memphis Street Railway Co. v. Stratton*, 131 Tenn., 620. But in each of these cases liability was enforced on the ground that the wrongful act complained of was committed within the scope or apparent scope of the servant's employment.

In *Railroad v. Garrett*, 8 Lea, 438, 499, the opinion expresses a doubt of the correctness of the opinion in the Starnes case, and this same doubt is again expressed in the latter case of *Beopple v. Railroad*, 20 Pick., 431.

In the case of *Stone Co. v. Pugh*, 115 Tenn., 688-698, the Starnes case is cited, without any expression of approval or disapproval; and in the Pugh case it was held

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that the owner of a wagon in charge of a skillful driver is not liable for the death of a child fatally injured in attempting to alight from the wagon after having climbed thereon at the invitation of the driver, who was neither expressly nor by implication authorized to invite children to get upon the wagon, and whose act in so doing was in no sense within the scope of his employment, nor in furtherance of his employer's business. However, it seems that this holding was, in some measure, based upon the fact that the wagon was not an appliance so dangerous and attractive to children as to require the owner to exercise greater care with reference to the use thereof than putting it in charge of a skillful, careful and prudent driver.

In *Burke v. Ellis*, 105 Tenn., 702, a receiver of a railroad was held liable for the act of the servants in permitting a child of tender years to climb on and ride upon a car loaded with loose earth, from which it fell and was injured. While in that case there is no discussion of the question now under consideration, yet it is apparent and must have been in that case that it was not within the scope of the servant's employment to invite and permit children of tender years to ride upon the loaded freight cars. And it is apparent that the receiver was held liable because of a wrongful, though unauthorized use, by the servant, of a dangerous instrumentality.

We know of no other of our own cases which throw any light on this question. In *I Redfield on Railways*, 511, it is said that the general principle that the master is not liable for the willful act of his servant has no application to railways, and the same author, speaking further with reference to the use of an engine by the person in charge thereof, says:

"He is acting with the instrument which the company has placed in his hands to be used on their behalf, upon

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the line of their road; he is acting instead of the corporation, and his acts will bind it whether done heedlessly or purposely" (paragraph 513).

"A master who entrusts the custody and control of a dangerous appliance or agency to the management of a servant will not be permitted to avoid responsibility for injuries inflicted thereby on the plea that the servant, in the particular act complained of, was acting outside of the scope of his employment." *Barmore v. V., S. & P. Ry. Co.*, 70 L. R. A., 627.

We are of opinion that the principle announced in *Railroad v. Starnes*, *supra*, was correct as applied to the facts of that case; and that that principle was by the trial Judge correctly applied to the facts of this case.

The first assignment of error is to the effect that there is no material evidence to support the verdict of the jury.

An assignment of this character, of course, presents both questions of law and fact. In disposing of the third, fourth, and fifth assignments of error we have already passed upon the question of law raised by this assignment. So that it only remains to be determined whether there is any evidence tending to show: (1) That the whistle was unnecessarily sounded; (2) whether it was sounded by a person in charge of the engine; and (3) whether the unnecessary sounding of the whistle caused the accident.

It is conceded that the sounding of the whistle, if it were sounded, was unnecessary. But it is insisted by defendant that there is no proof tending to show that the whistle was sounded, or that it was sounded by a person in charge of the engine. Two witnesses for the plaintiff testified that the whistle was sounded. It is true that several witnesses for defendant testified positively that the whistle was not sounded, but this assignment raises no

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question of preponderance of the evidence, nor of the credibility of the witnesses. The verdict of the jury determined both of those propositions in favor of the plaintiff. It is also insisted by defendant that the proof fails to show that the whistle was sounded by any person in charge of the engine. It is true the persons who were in charge of the engine all deny that they sounded the whistle; but the proof shows, by defendant's own witnesses, that there was no person on, or near, or about the engine except the persons in charge thereof. And it is also shown that, at the time the whistle was sounded, the fireman was on the engine. There is some controversy about the exact position of the fireman at the time it is said the whistle was sounded, but upon all of the proof, if it be found that the whistle was sounded, it is not only fairly inferable that it was sounded by the fireman, but the proof affirmatively shows that no other person was in a position to have sounded the whistle.

With respect to the third proposition it is sufficient to say that the plaintiff states that the sounding of the whistle was the cause of the accident. There was proof showing, or tending to show, the existence of each of these propositions of fact, and with respect to them and each of them, the jury has determined every conflict and controversy in favor of the plaintiff.

The second assignment of error complains of the action of the trial Judge in permitting the plaintiff to show the general surroundings at the time of this accident. Under this assignment it is insisted that it was error to permit the plaintiff to show at what distance the engine was from the crossing; that it was error to permit the plaintiff to show that when his team ran away one wheel dropped into an opening on the edge of the track, causing him to fall out.

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We are unable to understand the contention of defendant with respect to this matter. It was important and necessary that the plaintiff show his proximity to the engine. It was important and necessary that he show that he was injured, and the manner of his injury. The trial Judge clearly instructed the jury that the plaintiff could not recover because of the proximity of the engine to the crossing, nor because there was a culvert into which his wagon dropped. And, as above stated, we cannot see that there was any error in permitting the plaintiff to prove the conditions that existed at the time of the accident, nor can we see how the defendant was or could have been prejudiced thereby.

The sixth assignment of error is based on the refusal of the trial Judge of the sixth special request offered by the defendant. This special request was as follows:

"If the proof in this case should show that one of the plaintiff's horses was a horse in the habit of running away, and was unsafe, and this fact was known to the plaintiff, or might have been known to him by the exercise of ordinary care and prudence, and if the proof should further show that the plaintiff drove upon the track of the defendant in front of the two standing engines, and this horse that was known to be unsafe and easily frightened at an engine or otherwise, and that this fact was known to the plaintiff or might have been known to him by the exercise of ordinary care or prudence; then I charge you that the plaintiff was guilty of such gross contributory negligence as will bar his right to recover in this case."

This request was properly refused because it was not based on any facts appearing in the record. There is no proof that the horse was in the habit of running away. The only proof on this question is that at one time the horse was made to run away by a mule, in company with

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which it was hitched; and that on another occasion it got loose in some way, after being hitched to a post, but did not run away. There is no proof that the horse was unsafe.

The seventh assignment of error complains of the action of the trial Judge in refusing the ninth special request offered by the defendant, which was as follows:

"If the proof in this case should show that when the plaintiff attempted to cross the track of the defendant, and while he was crossing the track he struck one of his horses with a whip or stick while they were already frightened, and these horses ran away and threw the plaintiff out and injured him, in the way and manner testified to; then I charge you that the plaintiff would be guilty of contributory negligence, and it would be your duty and you must reduce his damages, if you find that he is entitled to recover anything at all in this case."

This special request was not correct, in that it asked the Court to take away from the jury an important question of fact; namely, whether the plaintiff's contributory negligence was the proximate cause, or one of the proximate causes of the injury. However, the general charge was full and fair with respect to the question of contributory negligence, and it was not error to refuse this special request.

The tenth assignment of error complains of the amount of the verdict.

The plaintiff was a young man about twenty-three years of age, a farmer and dependent upon his manual labor for maintenance and support. When he was thrown from the wagon his arm was badly broken, so that the broken ends of the bones protruded through the flesh. A piece of bone two inches long, a half inch wide, and a half inch thick had to be taken out of his arm. When he attempts to raise his arm he cannot do so with the palm of the hand

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down. At the time of the trial he was still suffering with pain in the arm. He paid \$100.00 for surgical attention, and \$28.00 hospital fees. In addition to that he had to pay for medicines and railroad fare to and from Memphis, where he was taken for treatment. He was totally incapacitated for labor for a period of sixty days. It is shown that his earning capacity was at least \$1.50 per day. His sufferings must have been acute and intense, and we do not think a verdict of \$1,200.00 as excessive.

The judgment of the Circuit Court is affirmed with costs.

MEMPHIS STREET RAILWAY V. LUCY B. FELTS.
(Two Cases.)

Affirmed by Supreme Court, 1916.

1. INSTRUCTIONS TO JURY. *Definition of negligence, repetition.*

Where the Court has properly defined negligence with direction that this definition be borne in mind, it is unnecessary for him to repeat this definition in connection with other instructions upon the subject of negligence.

2. SAME. *Negligence. Question of law. One conclusion.*

When from a given state of facts all reasonable men would conclude that a party was guilty of negligence, the Court may tell the jury that the given facts constitute actionable negligence.

3. SAME. *Carriers of passengers. Assumption by servants of another's freedom from negligence.*

A carrier being under obligation to exercise the highest degree of care for the safety of passengers, may not assume that others whose operations bring them within the range of con-

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tact with the instrumentalities of the carrier will themselves be free from negligence. The conductor of a street car may not at an intersection with a steam railway assume that the operators of trains thereon will always be free from negligence and comply with the law. The rule justifying a party in assuming that another will exercise care and comply with the law, does not apply to the relation of carrier and passenger.

4. SAME. *Special requests. Must be on facts.*

There must always be some facts tending to support a special request; else the Court may properly decline to submit it.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Part 4. H. W. McLAUGHLIN, Judge.

ROANE WARING for Plaintiff in Error.

J. W. CANADA for Defendant in Error.

SPECIAL JUSTICE HOLMES delivered the opinion of the Court.

THESE two cases were tried together in the Court below, and are heard together in this Court.

In the first case Mrs. Lucy B. Felts sues the Memphis Street Railway Company and the Illinois Central Railroad Company to recover for a personal injury sustained by her. The second case is a suit by the husband of Mrs. Felts against the same defendants to recover for expenses and loss of services of his wife on account of the injuries sustained by her. The cases were tried before a jury. There was a verdict in favor of defendant, Illinois Central Railroad Company, but against the Memphis Street

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Railway Company, Mrs. Felts' damages being assessed at \$7,500.00, and Mr. Felts' damages at \$500, and judgment was entered accordingly.

The Memphis Street Railway Company has appealed and assigns errors. There has been no appeal from the judgment dismissing the suit as to the Illinois Central Railroad Company, and these suits are ended so far as that defendant is concerned.

Mrs. Felts was injured when a street car, in which she was a passenger, while crossing the tracks of the Illinois Central Railroad Company, was struck by a freight train.

The declaration in each case simply charges each of the defendants with negligence at common law. And as no point was made in the Court below, and as none is made here, with respect to the sufficiency of the averments of the declaration, it is unnecessary to make further reference to the pleadings.

The accident occurred in Binghamton, a suburb of the city of Memphis, at a point where the tracks of the street railway cross a double line track of the Illinois Central Railroad Company at grade. It is not so shown in the proof, but we assume that this crossing is practically at right angles. At this point the tracks of the street railway run east and west, and the railroad tracks north and south, the two railroad tracks being about nine feet apart. The west track was used by southbound trains, and the east track by northbound trains.

At 6:35 o'clock in the afternoon of September 17, 1914, a motor car of the street railway, with trailer attached, approached this crossing from the west. Both the motor car and trailer were crowded, there being approximately ninety passengers on the two cars. A freight train going south was passing, or about to pass, on the west track of the railroad. The street cars were stopped approximately

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fifteen feet west from the crossing to permit this train of fifty-two cars to pass. It is shown that for about eight years it had been the custom of the railroad not to stop its trains at this crossing; that this was known to the street railway company and its employees, and to the conductor and motorman in charge of the street cars at the time of the accident. The street car conductor knew that the two tracks of the railroad were used by high speed trains. And he states that it was his duty, and a rule of his employment, that he should get off of the street car and see that the crossing was safe before signalling the motorman to cross. The railroad tracks are straight, and nearly on a level for almost a mile south from the crossing.

Before all of the southbound train had passed the crossing some of the passengers in the rear street car could see, over the top of the cars in the southbound train, the smoke stack and part of an engine coming north on the east track. Mr. J. E. Prewitt was a passenger in the rear car, and gives the following account of the accident:

"Well, I was sitting in the front end of the trailer reading a newspaper when somebody jumped up and hollered, 'Look at that mutt starting across ahead of that train!' I immediately jumped up and looked over the top of the cars going south and saw the train coming up. Everybody was running to the side door trying to get out. I saw I couldn't get out. I stayed where I was, stayed and watched the engine come on up and hit the trailer."

This witness at another place states that he was reading his newspaper by daylight.

Mrs. F. W. Faxon, a passenger on the motor car, gives the following account of the accident:

"A. Well, when we got to the railroad crossing there was a long freight train going by, going south, and it was

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going very rapidly, and my first impression was that we were going unusually close to that southbound train, and that rendered me rather nervous and alert, but no one else seemed to be affected in that way, and finally when we stopped, why, they were talking in front of the car. I could not hear what they said except they seemed to be counting the coaches as they went by, and I looked out the window and I saw coming a long ways off another train, and it seemed to be coming rapidly also, and naturally I was very apprehensive, afraid that there would be some trouble, and I watched that car for a while, but when it blew the whistle which it did long and loud and rang the bell, I thought that we had had every warning, that, of course, the conductor had seen the train coming, and so I was rather relieved naturally, but just as this southbound train passed, just as it cleared, the motorman started our car and I realized that there would be a collision, and I jumped up then and went to my brother and told him that we would all be killed as there was another car on us. The motorman about that time saw it, must have seen it also, because we were about across the track of the northbound train at that time and he switched off his power, and when the people realized that he did that they began telling him to go forward, that he could make it, to go on, and he put on his power then and we cleared the track, that is, the motor cleared the track, but that threw the trailer in front of this oncoming train and that caused the accident."

Several of the passengers heard the whistle of the northbound train sounded several times. The whistle was sounded four times at a point about a quarter of a mile south of the crossing, and again four times at about 200 or 300 feet south of the crossing. The bell had been ringing constantly for nearly a mile, and the headlight was burning.

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We now state the conduct of the street car conductor as testified to by him. When the street cars stopped at the crossing he got off and stood at the front end of the motor car. He did not hear the whistle nor bell of the northbound train. When the southbound train passed he walked across the west track looking towards the north. He then turned his head to the south and walked on to the east track, and, without stopping, threw up his hand as a signal for the motorman to proceed. Just here it is proper to state that some of the witnesses say he did not look towards the south at all. We do not believe he did, for we do not see, if he had looked toward the south, how he could have failed to see the approaching train, which was then not more than 200 feet south of the crossing; and it is inconceivable that he would have signaled the motorman to proceed if he had seen the approaching train. He says he was looking and listening, but neither saw nor heard the train. After signaling the motorman he walked on to a point about two car lengths east of the crossing. When he reached this point he heard his passengers screaming, turned around, and for the first time learned that a train was approaching. The engine was then nearly on the rear car, which was about half way across the east track.

There is some effort to account for the failure of the street car conductor to see the train by showing that there was a great deal of dust and smoke following the southbound train. Several witnesses for the Street Railway Company say there was a great deal of dust and smoke following the southbound train, the rear of which had reached Broad Street at the time the motorman started his cars across. Broad Street is seventy-nine feet south of the crossing where the accident occurred. The street car conductor, in speaking of the smoke and dust, says: "*It may*

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have kept me from seeing further south than Broad Street. I don't know how far I looked that way." In other words, this man, whose duty it was to exercise the highest degree of care in the protection of the passengers in his crowded cars, cannot say that he looked more than eighty feet to the south before he signaled the motorman to proceed.

The engine, with eighty-nine freight cars and a caboose behind it, crashed into the rear street car, demolished it, and strewed the track for a distance of 200 feet with its wreckage and dead and injured passengers. The injuries sustained by Mrs. Felts will be stated later.

There is no assignment of error that there is no evidence to support the verdict, nor is there any assignment based on the admission or rejection of testimony. All of the assignments save one, which complains of the amount of the verdict, are based on alleged errors in the charge to the jury, or upon the Court's refusal to charge certain special instructions requested by the Street Railway Company.

The first assignment of error is based on the following excerpt from the charge:

"On the other hand, gentlemen, if you find from the evidence that said dust and smoke did obstruct said crossing and did constitute an obstruction to said conductor's and motorman's vision toward the south, and did prevent their seeing the said approaching train; yet, if you further find from the preponderance of the evidence that whilst his vision was thus obstructed, said conductor signaled said motorman to proceed over said crossing; and if you further find that in thus signaling said motorman whilst his vision was thus obstructed, he was not in the exercise of due care, but was guilty of negligence which directly and proximately contributed to said collision; or, if you find that said crossing was not obstructed by dust and smoke from

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said southbound train, and said conductor's vision not obstructed by said dust and smoke, then you should find for plaintiff on defendant Memphis Street Railway Company's contention that it, through its conductor, was guilty of no negligence in thus signaling said motorman to proceed over said crossing because said conductor's vision was obstructed by dust and smoke, which prevented his seeing said approaching train."

It is said that this portion of the charge was erroneous because the Court did not point out to the jury how they were to ascertain whether or not the conductor was negligent, and in that the Court simply told the jury to find for the plaintiff, if the conductor was guilty of negligence in signaling the motorman to cross, when his vision of the crossing was obstructed, without in any manner telling the jury how they should weigh his actions, or of what negligence would consist, or what the conductor had a right to assume when undertaking to decide whether or not it was safe to cross when his vision was obstructed by smoke.

We think this contention of counsel is unsound. The Court had already told the jury what constituted negligence, and the whole charge left the jury in no doubt as to the meaning of that term. There is no error in this portion of the charge of which the Street Railway Company can complain. The Court should have charged the jury that if the conductor while his vision was so obstructed by smoke and dust that he could not see whether the crossing was safe, signaled the motorman to proceed, he was guilty of negligence; and that, if his negligence in so doing proximately contributed to the accident, the jury should return a verdict against the Street Railway Company.

The second assignment of error is based on the following excerpt from the charge:

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"There is no law which requires a steam railroad company to stop its train before crossing the tracks of a street railway company."

We see no error in this portion of the charge. We know of no law that requires a steam railroad company to stop its trains before crossing the tracks of a street railway. The Act of 1871, cited in support of this assignment, requires commercial railroads to stop their trains before crossing the tracks of another railroad. There is neither averment nor proof to make that act applicable in this Court. The authorities cited in this connection do not sustain the proposition that a commercial railroad must stop its trains before crossing the tracks of a *street railway*. But if there were a law which required the Illinois Central Railroad Company to stop its trains at this crossing, that defense would not be available to the Street Railway Company in this case. This is an action by a passenger on one of the Street Railway Company's cars. It is shown that for eight years the railroad company had not stopped its trains at this crossing; that its custom not to stop was known by the Street Railway Company and its employees, and by the conductor in charge of the street cars at the time of the accident.

The third assignment of error complains of the action of the trial Judge in submitting the question of punitive damages to the jury. It is not insisted that this portion of the charge was incorrect in itself. But it is said that a submission of this matter was not warranted by the facts of the case, and that it was calculated to mislead the jury. While we think the submission of this question was warranted by the facts of the case, it is unnecessary to say more in passing upon this assignment than that it is clear the jury did not allow punitive or exemplary damages, and since none such were allowed, the error, if any, was

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rendered harmless. *American Lead Pencil Co. v. Davis*, 108 Tenn., 251-257.

The fourth assignment of error is:

"The Court erred in declining to give the defendant's special instruction No. 1, which was as follows: 'The Court charges you that the conductor in charge of this car when he went across the track for the purpose of flagging and ascertaining whether or not a train was coming, had a right to assume if a train was coming, that it would give proper and reasonable warning of its approach, and if it was dark and foggy that it would carry a headlight reasonably bright enough for him to see.'"

It is not error to refuse to give an instruction unless the instruction requested correctly states the law and is based upon the facts of the case. This request was incorrect, first, because it is not a correct statement of the law as applicable to the facts of this case. The street car conductor, in the protection of his passengers, was required to exercise the highest degree of care. Street railway companies are common carriers, and, as such, are bound to exercise the highest degree of care in the transportation of passengers, and are liable to passengers for any injuries that might have been avoided by the *utmost degree of care and skill* on the part of the carriers' servants. *I. C. R. R. Co. v. Kuhn*, 107 Tenn., 107. The street car conductor, in crossing this place of known danger, had no right, at the hazard of his passengers' lives, to indulge any presumption nor to assume anything with respect to approaching trains. It was his duty to *know*, so far as human intelligence could discover, whether or not the crossing was safe.

Again, this instruction is incorrect as not based upon the proven facts. There is no proof that it was dark and foggy at the time of the accident.

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Again, it is incorrect in that the Court is asked to charge the jury that the conductor had a right to assume that if a train were coming "it would carry a headlight reasonably bright enough for *him* to see." This establishes a wrong criterion. We can hardly imagine a light bright enough to have penetrated to the sleeping consciousness of this conductor, nor a noise loud enough to have awakened him to a sense of his responsibilities.

What we have said with regard to the degree of care required of the street car conductor applies with equal force to the fifth, sixth, seventh and ninth assignments of error.

We have no criticism to make of the authorities cited by counsel in support of these assignments. To some of them we have not had access, but such of them as we have been able to read were cases involving questions of contributory negligence of persons who were required to exercise only ordinary care to avoid injury. *R. R. v. Deis*, 98 Tenn., 655; *Satterwhite v. R. R.*, 112 Tenn., 185. We concede that one approaching this crossing and required to exercise only ordinary care might, without negligence, have assumed that, if a train were approaching this crossing, it would not be operated in a careless nor negligent manner. But it was the duty of the street car conductor, at that place of known danger, to exercise the utmost vigilance and to protect his passengers from any danger that human intelligence could have discovered.

The eighth assignment of error is:

"The Court erred in declining to give the defendant's special instruction No. 7, which was as follows: 'The Court instructs you that in considering the question of compensation you cannot allow nor consider anything about expenses of litigation or attorney's fees.' "

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It is said that the Street Railway Company was entitled to this instruction because of certain remarks made by counsel for Mrs. Felts in his argument to the jury. An excerpt from this argument is copied into the bill of exceptions. This quotation from the argument is too long to be copied in full into this opinion. But it appears that counsel for Mrs. Felts stated to the jury that she was not concerned with the controversy between the two defendants, and he appealed to the jury not to lose sight of her rights in an effort to determine which one of the defendants were responsible for her injuries. And he said in this connection:

“This conflict should not have any effect on this little woman, with the expense of litigation, the expense of lawyers, and all of the other expenses, and the heart-breaking delays attendant upon the effort to have her right established, especially where it is admitted by two great corporations as these two are.”

This is the sole basis for the special instruction requested. There was no objection to this argument at the time it was made. The Court correctly charged the jury with respect to the measure of damages, and we are satisfied that the jury did not consider the expenses of litigation and attorneys' fees as an element of damages, and we do not think that the Street Railway Company was hurt in any way by this argument, nor by the failure of the Court to charge the special instruction.

The tenth assignment of error is that the verdict in the case of Mrs. Felts is so excessive as to evince passion, prejudice and caprice on the part of the jury. Affirmed.

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MEMPHIS STREET RAILWAY V. WILLIAM KENNEDY.

Affirmed by Supreme Court, 1916.

1. STREET RAILWAY'S NEGLIGENCE. *Collision at crossing. Contributory negligence.*

Whether a street railway negligently collided with an automobile at a street crossing is a question of fact for the jury. And whether a party driving the machine was guilty of negligence in not stopping or looking or listening is likewise a question of fact where the crossing is blocked by buildings or obstructions or otherwise.

2. GROSS NEGLIGENCE. *Punitive damages.*

Where it is admitted by the motorman in charge of a car that his brakes were out of fix and that he was running at a speed of twenty-five or thirty miles per hour and was approaching a much-used crossing, the Court was authorized to submit to the jury the question of gross negligence and the assessing of punitive damages.

FROM SHELBY COUNTY.

Appeal in error from the Third Circuit Court of Shelby County. JOHN BROWN, Special Judge.

L. P. MILES for Plaintiff in Error.

J. W. CANADA for Defendant in Error.

SPECIAL JUSTICE HOLMES, sitting during the disability of Justice Hall, delivered the opinion of the Court.

THIS action was brought in the Circuit Court of Shelby County to recover damages resulting from a collision be-

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tween the automobile in which defendant in error was riding and one of plaintiff in error's cars. The jury rendered a verdict for \$3,000.00, compensatory damages for the personal injury—\$500.00 for damage to the automobile, and \$500.00 as punitive damages. Judgment was rendered thereon, and the Street Railway Company has appealed and assigned errors.

The first assignment of error is:

“The Court erred in refusing to direct the jury to return a verdict in favor of the defendant at the conclusion of all the testimony in the case upon the ground that the evidence showed plaintiff to have been guilty of such contributory negligence as would bar a recovery.”

To sustain this motion it was necessary that the trial Judge determine three propositions of fact:

- (1) That the defendant was guilty of negligence which contributed to the injury.
- (2) That the plaintiff was guilty of negligence.
- (3) That the negligence of plaintiff proximately contributed to the injury.

Without reciting any of the evidence it is sufficient to state that the first proposition is established beyond all question and is admitted.

The negligence charged against the plaintiff is that he did not look towards the north, the direction from which the street car was coming, before driving his automobile upon the track. Unless the facts establishing contributory negligence appear from the plaintiff's proof, the burden of proving contributory negligence is upon the defendant. The accident occurred at the point where Gage Avenue crosses Florida Avenue at right angles. The street car track is on Florida Avenue, running north and south. Mr.

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Kennedy, the plaintiff, was driving east on Gage Avenue. His view towards the north on Florida Avenue was obstructed by a two-story brick building, which stands at the northwest corner of the intersection of the two streets, the east line of the building being just twenty-eight feet from the west rail of the street car track. No witness testifies that Mr. Kennedy did not look towards the north when he reached the intersection of the two streets. The only proof on this subject is that he was not looking towards the north *when his automobile was rolling upon the track*, but it is indisputably proven that when he emerged from behind the brick building, and was less than twenty-eight feet from the track, the street car was about 100 feet from the crossing. Under this state of facts the question of contributory negligence was one for the jury and not for the Court.

In *Railway Company v. Haynes*, 112 Tenn., 712, it was held that the negligence of the plaintiff is as much a matter for the examination of the Court as is that of the defendant with a view to determining *whether* there was negligence in law, but that whether such negligence, conceding its existence, *was the proximate cause of the injury* was always a question for the jury. The holding in that case is not in conflict with the holding in *Mayor & Aldermen v. Cain*, 128 Tenn., 250, that where it is *established beyond question* both that the plaintiff was negligent, and that his negligence proximately contributed to the injury, the case is one for a directed verdict.

The facts of this case hardly raise a question of contributory negligence; certainly they present no case for a directed verdict, and this assignment of error is overruled.

The second assignment of error is:

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"The Court erred in directing the jury that, upon this record, they might, in their sound discretion, award punitive damages."

We have examined the charge to the jury, and find that it correctly submitted the matter of punitive damages. We are of the opinion that there was abundant evidence to warrant a submission of the question of punitive damages to the jury. The street car which collided with the automobile was a large, double truck car. The motorman in charge of the car admitted that he knew his brakes were not working; that he knew the crossing where the accident occurred was an important and busy crossing, and that it was used by school children on their way to and from school; that he did not have his car under control as he approached the crossing. In addition to this it is shown that the car was coming down grade, running at the rate of twenty-five or thirty miles per hour, and traveling at such speed that after it had struck and demolished the automobile, the motorman was not able to bring it to a stop until he had gone between 100 and 150 feet beyond the place of the collision. We think, upon these facts, the matter of punitive damages was properly submitted to the jury, and that the jury was well warranted in returning a verdict for punitive damages. There are no other assignments of error.

The judgment of the Circuit Court is affirmed with costs.

Crabtree v. Hatcher.

I. W. CRABTREE V. HARRIS HATCHER.

Writ of error granted by the Supreme Court, March, 1914.

Carried over and affirmed April, 1915.

(*Nashville*. September Term, 1913.)

1. COLOR OF TITLE, DESCENT OF. *Grant from State not color of title in heir-at-law of grantee where grantee without title or possession.*

One to whom the State has issued a grant purporting to vest him with title to realty, but who was not thereby vested with such title because title was then outstanding in another, and who was never in possession, actual or constructive, under the grant, has no such interest in or right under the grant as that it will become color of title in his heir-at-law; such being the unchanged common law in Tennessee.

2. COURTS NOT OPEN. WHEN. *No one to serve process.*

Courts were not open for the institution of suits during the Civil War by virtue of the fact that bills could not be filed and process issued when there was no sheriff or other officer to serve such process.

3. GUARDIANSHIP, TERMINATION OF. *On marriage of female ward.*

The marriage of a female ward terminates the guardianship of such ward, although she be under twenty-one years of age.

FROM FRANKLIN COUNTY.

Appeal from the Chancery Court of Franklin County.
V. C. ALLEN, Chancellor.

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FRANK LYNCH and FELIX LYNCH for Complainant.

ROBINSON & FANCHER for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the Court.

COMPLAINANT claims title to a large boundary of lands lying in Franklin County, while defendant claims title to a boundary of five hundred acres lying almost wholly within the boundary claimed by complainant. By his original bill, complainant seeks to have defendant's claim of title declared a cloud on his, complainant's title, and removed therefrom. Defendant's answer denies complainant's title, and avers that his, defendant's, title has been perfected by adverse possession. The claim of complainant to the larger boundary is under and by virtue of a grant issued by the State of Tennessee to Arthur L. Campbell in December, 1838, and a chain of title duly connecting him therewith. Defendant's claim to the smaller boundary is under and by virtue of a grant to Overton H. West, dated June 30, 1849, and adverse possession for more than seven years thereunder, and subsequent conveyances passing or attempting to pass the title to him. The Chancellor found the issues in favor of complainant and decreed accordingly. Defendant appealed to this Court and has here assigned errors.

It is not disputed that the grant to Campbell was valid and legally sufficient to pass title, nor is there any question made before this Court as to complainant's claim of title being sufficient to vest him with all title that passed under the grant to Campbell. It is also conceded that the grant to West is inferior to that to Campbell; so that the decision of the case depends on the question of adverse possession under the West grant.

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After the grant to Overton H. West was issued, and before he had ever taken possession of any of the lands covered by the grant, West died. He was survived by a widow and one child, an infant daughter named Josephine. In 1850, one W. F. Guthrie married West's widow, and in 1856, acting for his step-daughter, as he claims, he cleared and improved and took possession of about six acres of the land now claimed by both complainant and defendant and lying within both the Campbell and West grants, and held that possession for more than seven years for her under the grant to her father.

It is seen that West, the grantee, did not have title to any of the lands now in controversy at the time of his death, for the reason that the title had become vested in Campbell in 1838, previous to the issuance of his, West's grant in 1849; and the question is whether, as he had neither title nor possession at the time of his death, the grant to him became color of title in his heir-at-law. It is very earnestly insisted by counsel for defendant that the grant did become color of title in the hands of his infant daughter, while counsel for complainant with equal earnestness insists that it did not.

What is the law applicable to the situation?

By the common law in order that lands might descend from one to his heir or heirs it was necessary that he have actual corporal seizen thereof, or the equivalent of such seizen. As said by Blackstone, "No person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had actual seizen of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of a freehold; or unless he hath had what is equivalent to corporal seizen in hereditaments that are incorporeal; such as the receipt

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of rent, a presentation to the church in case of an advowson, and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised." Black. Com., Book 2, star page 209. See, also, 4 Kent's Com., star page 385; 3 Wash. on Real Property, star page 409; *Guion v. Anderson*, 8 Humph., 298, 323.

It cannot be questioned, however, that the canons of descent as they existed under the common law have been materially modified by our statutes, and the question is whether or not they have been modified to the extent that where an ancestor was neither vested with title nor had possession at the time of his death, a paper purporting to vest him with title can become a color of title in his heir at law.

Acts 1874, Chapter 22, section 2, provided that "When any person shall die seized or possessed of, or having any right, title, or interest in and to any estate, or inheritance of land, or other real estate in fee simple, and such person shall die intestate, his or her estate or inheritance shall descend" to his children, etc. (Nicholson & Caruthers' Statute Laws of Tenn., page 247), and this statutory provision, with its modification passed in 1796, which is not material to the matter now under consideration, is, as we understand, still the law of this State. It is the foundation of our statutes of descent applicable here as carried into Shannon's Code, section 4163, sub-section 1, as noted in that compilation. Speaking of this statute of 1784, and quoting from it the very language we have just set out, in *Campbell v. Taul*, 3 Yer., 548, 561, it was said by Chief Justice Catron, speaking for our Supreme Court, that "Every word in the recited clause must have its effect." Applying that rule, it is seen that it is only such property as the ancestor is *seized* or *possessed* of, or that he has any *right*, *title*, or

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interest in, that descends to his heir. So that, according to the express provisions of this statute, the ancestor must either have some right, title or interest in realty, or he must be seized or possessed of it, before it can descend to his children; and, as Overton H. West had no right, title, or interest in any lands that the grant to him purported to convey, because at the time it was issued all the title was outstanding in another, and as he was not seized and possessed of those lands or any part of them, it appears clear that he had no rights under or by virtue of the grant which could descend to his heir.

Nor can it be conceived that the change of phraseology from the original statute of 1784 to that used in the Code of 1858, section 2420, section 4163 of Shannon's Code, in any way enlarged the scope of the original enactment in so far as it applies to the case under consideration. By the Code of 1858 the section referred to was made to read that "The land of an intestate owner shall be inherited in the following manner," etc. If this section alone could be looked to, and if we were forced to construe it literally, it would be only the lands that an ancestor dies actually *owning* that descends to his heirs at law. But, clearly, such is not the meaning of that Code provision, and the Act of 1784 is still in force and must be looked to in construing it.

But we are not without expressions by our Supreme Court on this question. In *Iron & Coal Co. v. Broyles*, 11 Pickle, 612, 617, it is said, speaking of one in actual adverse possession under color of title:

"Felix Broyles was in the adverse possession of that tract of land, and the statute began to run in his favor as early as 1867. He continued that possession so long as he lived, and, since his death, his heirs have kept it up, thereby making, in all, a continuous adverse possession from 1867 to the seventh day of May, 1889 (the date of the

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amendment), a period of some twenty-two years. Possession of the heir may be coupled with that of the ancestor holding under paper title, descent being an 'assurance of title,' within the meaning of the statute. *Hubbard v. Wood*, 1 Sneed, 280; *Meriwether v. Vaulx*, 5 Sneed, 310; *King v. Rowan*, 10 Heis., 675; *Corder v. Dolin*, 4 Bax., 240; *Baker v. Hale*, 6 Bax., 51; *Marr v. Gilliam*, 1 Cold., 504."

Here is recognition that the "*possession* of the heir" must be coupled with that (the *possession*) of the ancestor "holding under paper (color of) title" in order to complete the statute of limitations, which would exclude the idea that the ancestor not so holding can transmit to his heir mere color of title; and the cases referred to support this view. The Marr-Gilliam case specially supports it, styling bare possession as first degree of title, thus showing the importance of possession.

Furthermore, these expressions of our Supreme Court are but in keeping with the authorities generally. In 2 Am. & Eng. Encyc. of Law and Practice, 507, it is said: "A descent cast on heirs by the death of the ancestor dying in possession, though he was a mere trespasser, gives color of title to the heirs."

In 1 Cyc., 1101, it is said:

"A title by descent cast is color of title. So, where a person dies in possession of land and the possession is continued by his heirs, their possession is under color of title; and this is true although the ancestor held under a mere claim of right and without color of title himself. And where the ancestor had title the heir has color of title, although the ancestor was not in possession."

This Court does not controvert the proposition that descent cast is color of title, a matter very much stressed in

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argument, but, as the authorities already quoted clearly indicate, the ancestor must have something to descend before there can be descent cast. What had Overton H. West that could descend to his daughter? It is conceded that he did not have title, so that there was no title in him to descend. He did not have possession,—the first degree of title, so what was there to descend?

It results that we are of the opinion that the grant to her father was not color of title in the hands of Josephine Wells (nee West), and it not being claimed that she had possession for sufficient length of time to perfect title in the absence of a color of title the decree of the Chancellor awarding the relief prayed in complainant's bill must be and is affirmed, with costs.

We feel that if this were a Court of last resort it would be unnecessary to go further in this case, but it not being a Court of last resort, and other questions being pressed in favor of defendant, we deem it our duty to pass on them, and will now do so.

One question of fact in serious controversy is the character of possession held by and on behalf of Josephine Wells, and the length of time that possession was held. Defendant's counsel insist that the lands claimed by defendant were adversely held by Josephine Wells, or by others on her behalf, from July or August, 1856, to the year 1874, or a period of about eighteen years, while complainant insists that this possession was not the possession of Josephine Wells, and that it was not for the full time claimed for defendant. We find the facts on these contentions to be as follows:

On March 14, 1849, a survey was made for and on behalf of Overton H. West of fifteen hundred acres of lands, and on June 30th of that year, or about three months and a half after the survey, the grant to West was issued.

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About this time,—we think just after the grant issued, West died, never having taken possession of the lands, as hereinbefore stated. About September,—certainly not earlier than August, 1856, W. F. Guthrie, who had married West's widow in 1850, took possession of the lands. He made a clearing of about six acres, and built a small log cabin in the clearing, and moved into the house. He remained on the lands until the last of April, 1857, when one Enoch West took possession under him and remained there five or six years, which carried the possession up to 1863 or 1864. One Bill Dechard then moved into the house and stayed there under Guthrie for something more than a year. When Guthrie married the widow of Overton H. West, Josephine West was a small child, it appearing that she was born in 1846. She had a guardian when Guthrie married her mother, and her step-father took possession of the lands, or a part of the lands, covered by the grant which had been issued to her father. In the language of Guthrie, this guardian told him (Guthrie) "to go ahead and make the improvements on the lands." The child, Josephine, was then living with Guthrie and his wife, and continued to live with them until her marriage, which, according to her testimony, occurred when she was seventeen years old. This marriage occurred about the year 1863. Josephine, on her marriage ceased to be a member of the family of her step-father, she and her husband moving out to themselves.

From this statement of the facts it is seen that Mr. Guthrie held possession of the lands for more than seven years from the date of his entering on and taking possession of them in 1856, and we are of opinion that that possession, in so far as it could do so, inured to the benefit of his step-daughter, Josephine West. In other words, if the grant to her father had been color of title in her, we

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are of opinion that the possession would have inured to her benefit. Under the holding in *McLemore v. Durivage*, 8 Pickle, 482, and cases there cited, particularly the case of *Franches v. DeMontegre*, 1 Head, 40, we are of opinion this would have been the necessary result; and it is further apparent, we think, that if that instrument had been color of title in her hands the holding by her step-father and his tenants would have perfected her title but for the arresting of the running of the statute of limitations by the Civil War not later than July 4, 1863.

It is shown that there was no term of the Chancery Court of Franklin County held from February, 1863, to August, 1865, and that there was no term of the Circuit Court of that county held from some time previous to June, 1863, to 1865. It is further shown that from July 4, 1863, absolutely no Courts in the county were held till 1865, and that the county was without a sheriff. It is true it is made to appear that some of the clerks took their record books home with them and kept them there during this period, and that entries were made on the rule docket of the Chancery Court showing that bills were filed and that process was issued as late as October and November, 1863.

It is insisted on behalf of defendant that as bills were filed and process was issued as late as October or November, 1863, the Court was open for business, and that the running of the statute was not arrested, until that late in the year. We are of opinion, however, that under the holding in *Conk v. Railroad*, 1 Shannon, 409, the Courts cannot be regarded as open by virtue of the mere fact that bills could be marked, filed and process issued thereon when there was no sheriff or officer to serve such process, and that the running of the statute was arrested in any event not later than July 4, 1863; and we think it follows

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that the holding of Guthrie for his step-daughter could not have completed her title, even if she had had color of title, for the reason that under his holding the full seven years would not have elapsed until in August or September, 1863.

Inasmuch as there is considerable controversy about when Guthrie made his improvements we can say that we rest our finding on his own testimony and that of his step-daughter, Josephine. He says in one place in his deposition that this was done in July or August, 1863, but explains later that he did not begin the building of the house and the making of his improvements until after his crops were "laid by" that year, which, he indicates, was in July, and that it took him about six weeks to build the house and get ready to move in and take possession. In another place he speaks of taking possession in the fall of 1863; and Josephine speaks of his possession being taken in that fall. We think his possession was not taken earlier than September of that year, and so find.

It is further insisted on behalf of defendant that after the close of the Civil War, Guthrie held possession for his step-daughter until 1874,—that, in fact, his possession for her was continuous from 1856 to 1874, and that his holding for and on her behalf after the close of the Civil War added to that before, completed her title. A careful reading of the record convinces us that this contention of fact as to his later holdings is not well made. First, we are of the opinion that the possession held by Guthrie after the Civil War was not for, or that it could not inure to the benefit, of his step-daughter. He discloses that he was in the Civil War from 1862 to 1864, and says when he returned from the war in 1864 he again took possession of the improvements he had made in 1856, but he nowhere intimates that he sought permission from the guardian of Josephine to repossess himself of the lands, or that he had

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her permission or the permission of her husband; and if he had attempted to seek the permission of Josephine's guardian, or the man who had been her guardian, and had obtained it, it would have been a nullity, for the reason that it is well-settled law that the marriage of a female ward, although she be under twenty-one years of age, terminates the guardianship. *Jones v. Ward*, 10 Yer., 160; *State v. Parker*, 8 Baxter, 497; *Lane v. Farmer*, 11 Lea, 568.

A second reason why the later holding did not inure to the benefit of Josephine is that after her marriage she ceased to be a member of Guthrie's family, and the doctrine of the McLemore-Durivage case, already referred to, could, under the authorities, have no application. Still a third reason why the holding of Guthrie after the close of the Civil War would not inure to the benefit of his step-daughter so as to be added to the holding before is that the holding was not so connected with the earlier in point of time and not so continuous as to have that effect.

We deem it unnecessary to discuss the great volume of evidence on this question, but will say that we have read it and re-read it with much care. Taking Guthrie's own statement of fact to be true, he fails to show a connected and continuous possession. True, there is some evidence offered tending to show much more possession than Guthrie claims, but this is inconsistent with Guthrie's swearing. To illustrate the point, much evidence was taken with a view of establishing that one Bill Dechard lived on the lands something like three years under Guthrie, when Mr. Guthrie does not claim to have had him there as his tenant for more than "a year or more," as he expresses it. Then, those who attempted to establish possession for three years by Dechard show that he went to the place in the spring and moved away in the autumn and then went back again the

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next July or August, and then away and back a third time. Yet, his daughter, whose testimony is relied on most strongly by defendant to show Dechard's holding for three years, when asked what made her father go back to the Guthrie place after he had first left it, answers: "We all took the chills and moved right back to the Guthrie place," thus unmistakably indicating that the going back was not because of any previous intent, but because of sickness in her father's family, and that therefore the previous going away was not meant as a mere temporary leaving. It is too well settled to require the citation of authorities that a going away or a vacating of the property without an intent to return to it or hold possession in the meantime would be an abandonment of possession regardless of the time he was away.

One other matter insisted on in a supplemental brief filed on behalf of defendant is that Overton H. West died before the date of the issuance of the grant to him, and that under our statutes the grant when it issued inured to the benefit of his heir-at-law and became to all intents and purposes the same as if issued to her originally. We think this contention unsound for two reasons: First, considering all the facts and circumstances in the record, we are of opinion that Mr. West did not die before the issuance of the grant to him. In his original brief counsel for defendant insists that the facts and circumstances establish that West died *after* the grant issued, and this we think is correct, notwithstanding the change of position on this question in a supplemental brief. We find the fact as we do, although Mr. Guthrie in his deposition speaks of the death of West as having occurred "somewhere" in 1846 or 1847, saying, "I think" that is when he died; and also in the face of the testimony of the daughter, Josephine, in which she refers to her father's death as having occurred

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in 1848. She also qualifies the date given by her, saying first that she hardly knew the date, and then "I think he died in August, 1848." It is evident that neither of these witnesses know the date and that neither means to attempt to fix it. The fact that the survey was made in 1849, and that immediately thereafter the grant issued, both of which were in West's name, indicate that he was living when they were made, and we so find the fact.

A second reason why the contention that the death of West before the grant issued vested his daughter with title just as if the grant had issued to her and in her name, or that she must be treated as the direct grantee named in the grant, even if Overton H. West died before its issuance, is that under our statutes and decisions the grant in such cases relates back to and becomes operative as if issued in the lifetime of the grantee named therein. *Dougherty's Heirs v. Edminston*, Cooke, 134. But the facts as we find them do not call for an application of the law contended for, even if it be the law, and it is not necessary to consider it further.

Complaint is also made at the action of the Chancellor in refusing a continuance of the case that defendant might retake the deposition of Guthrie and his step-daughter on the question of Guthrie's holding possession for her. We find that it was not necessary to retake the depositions of these parties on this question, and have given to the depositions of Guthrie found in the record all the force and effect claimed for them or which it is claimed a retaking of both could have. Therefore there was no error in refusing the continuance.

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BEULAH VANDIVER v. W. E. WALKER.

Writ of certiorari denied by Supreme Court.
(*Nashville*. September Term, 1915.)

MARRIAGE CONTRACT, WRONGFULLY CAUSING BREACH OF. *Not actionable when child so influences parent as to cause.*

For a child, a son, on learning that his father has entered into a marriage contract wrongfully, fraudulently and maliciously to persuade and coerce and use undue influence over him, the father, and thereby induce him to breach the contract, and refuse to enter into the marriage, in and of itself, and independently of the slander or libel, furnishes no ground for an action for damages caused thereby.

FROM FRANKLIN COUNTY.

Appeal in error from the Circuit Court of Franklin County. NATHAN BUCHANAN, Judge.

JESSE LITTLETON and FELIX LYNCH for Plaintiff in Error.

FRANK LYNCH and FLOYD ESTILL for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

THIS case is here on appeal of plaintiff below, Beulah Vandiver, from a judgment of the Circuit Court of Franklin County sustaining a demurrer to her declaration. In the declaration, which is in two counts, it is alleged that plaintiff and one G. W. Walker entered into an agreement

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to marry each other; and in the first count stating her cause of action, she alleges as follows: "That the defendant W. E. Walker is the son and only child of the said G. W. Walker, and as soon as he learned of the above agreement between the plaintiff and the said George W. Walker, he began to use his influence with his father to induce him to breach his contract and refuse to marry plaintiff, and on the — day of February, 1913, the said W. E. Walker, with full knowledge of said agreement and contract, wrongfully persuaded and induced his father, the said G. W. Walker, to breach his contract and refuse to carry out the same."

In the second count of the declaration it is alleged: "That the defendant, with full knowledge of the contract and agreement between plaintiff and the said G. W. Walker, maliciously and fraudulently by the use of persuasion and coercion and undue influence induced the said G. W. Walker to breach his contract to marry plaintiff, and on account of which the said G. W. Walker did, on the — day of February, 1913, breach his contract and agreement to marry plaintiff by refusing to carry out the same, although the plaintiff was ready and willing to perform her part of the contract."

The demurrer makes the questions: First, that the son had the right to advise his father not to marry, and to persuade him not to do so; second, that the defendant was not charged with maliciously interfering with the marriage contract; third, that the alleged damage resulted from the breach of the contract with G. W. Walker, and the breach was the efficient and proximate cause of the damage, and the alleged wrongful interference on the part of the son was the remote cause thereof.

In 1 Cooley on Torts (3d Ed.), 494, is found the following:

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"The prevention of a marriage by the interference of a third person, cannot, in general, in itself, be a legal wrong. Thus if one, by solicitation, or by the arts of ridicule or otherwise, shall induce one to break off an existing contract of marriage, no action will lie for it, however contemptible and blamable may be the conduct. But a loss of marriage may be such a special injury as will support an action of slander or libel, where the party was induced to break off the engagement by false and damaging charges not actionable *per se*. Here the action, it is perceived, is for the defamation, and the loss of the marriage only the damage flowing from the injury. A contemplated marriage might be prevented by the forcible separation of the parties, or by the imprisonment of one of them; but the wrong in contemplation of law, would consist in the assault, or in the false imprisonment, and not in the loss of marriage. The suit might, therefore lie in favor of one party, and not in favor of the other, if only one was subjected to the illegal force.

"It has been held, however, that if one, by the false and malicious assertion to the intended husband that the woman is already his own wife, succeeds in breaking up an intended marriage, the woman may have an action against him for this fraud."

We also find the case of *Leonard v. Whetstone* (Ind.), 107 Am. St. Rep., 252, in point. That suit was brought by a woman against the parents of a man who she alleged had breached a contract to marry her, to recover damages for their alleged wrongful acts in causing the breach of the contract. In her declaration she alleged that the man who had breached the contract had, with the knowledge and consent of his parents, been her suitor for three years; that he won her affections and they became engaged to marry, and under the promise to marry her he had seduced her

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and begotten her with child; that he applied for a license to marry her, all of which facts his parents knew; and she charged that with knowledge of the facts the parents, to quote the language of the Court in the opinion, "conspired together to wrong the appellant (the woman suing) and to prevent the marriage by maliciously persuading, commanding and hiring their said son not to marry appellant, and to violate his said marriage contract; that appellees (the parents) falsely stated to the clerk of the Circuit Court that their said son was a minor, and commanded the clerk not to issue the marriage license, and, further, to cause said marriage contract to be broken, they told their said son that if he married appellant they would drive him from home, disown and disinherit him; that appellees hired another person to take said son to parts unknown, and paid said son large sums of money to remain away, so that appellant could not communicate with him; that by reason of said acts and words of appellees, the said son refused to marry appellant; . . . that the appellant, on account of said promise to marry, made preparations therefor, and denied herself the society and attentions of other young men; that but for the wrongful and malicious acts of appellees, their said son would have married appellant, and continued to love and respect her. The further allegation is made that at the time this action was commenced, appellant had become the mother of the child begotten as aforesaid, and that by the acts of appellees she had been damaged in the sum of ten thousand dollars." It was also alleged that the parents had spoken to their son "false and slanderous words of and concerning (the woman he had contracted to marry); imputing to her the sin of whoredom and the crime of abortion."

The trial Court sustained a demurrer to the declaration in that case, and that action of the trial Court was sus-

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tained by the Appellate Court, the last named Court in its opinion saying:

"We cannot hold other than that a parent has a perfect right to advise the child whether he or she shall enter into a contract of such importance as one of marriage. Nor should parents' advice be withheld from a child where an agreement to marry has been made, and in the judgment of the parents of either of the contracting parties, the union ought not to take place."

Then, after quoting with approval some of the language hereinbefore copied from Cooley on Torts, it was further said in the Leonard-Whetstone case:

"But if a person is induced to refuse to comply with his agreement to marry by false and slanderous charges made against the other party to the agreement by a third person, the action is not against the third person for causing a breach of the contract, but for slander or libel, as the case might be.

"Appellees' advise may have induced their son to refuse to perform his contract to marry appellant. This was not an actionable wrong upon the part of appellees. If the son was of legal age, he had a right to refuse to act upon the advice given. He was not advised to commit the crime of seduction, nor does the complainant so charge.

"Neither paragraph of the complaint, under the acknowledged theory of the pleader, states a cause of action."

It is seen that, in the case just quoted from, the decision of the Court was based on the fact that the alleged wrong was done by parents in influencing and controlling the action of their son, and that, too, where the strong allegations were that the parents had *commanded and hired* the son not to marry, and had *threatened to drive him from home and disown and disinherit him* if he did marry, and, to prevent the marriage, had *hired another to take him to parts*

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unknown, and had paid him large sums of money to remain away, and had spoken to their son false and malicious words of the plaintiff, imputing to her the sin of whoredom and the crime of abortion. Yet, because of the relation of parent and child existing between the parties, the declaration was held demurrable; and we are of opinion that the fact of the relationship of the defendants in the instant case to the son whom they are accused of having improperly influenced, is the controlling matter.

As indicating the importance of the fact of the relationship of parent and child, we refer to other authorities. In *Gerner v. Gerner*, 185 Pa., 233, 40 L. R. A., 549, a father was sued for damages for inducing his son to leave his, the son's, wife. In the course of the opinion in that case it was said, speaking of the rights of the father: "It was his right to advise his son, and in so doing, in good faith and with the proper motive, he should not be regarded in the same light as a mere intermeddler."

The case of *Tucker v. Tucker*, 74 Miss., 93, 32 L. R. A., 623, was brought by a wife against her husband's father to recover damages on a charge that the defendant had alienated the affections of his son for the wife, and caused him to leave her; and, in the course of the opinion in that case, it was remarked that, "The instinct and conscience unite to impose upon every parent the duty of watching over, caring for, and counselling and advising the child at every period of life, upon marriage and after marriage, whenever the necessities of the child's situation require or justify such action on the parent's part. The reciprocal obligations of parent and child last through life, and the duty of discharging these divinely implanted obligations is not and cannot be destroyed by the child's marriage. Multiplied instances will occur to the mind in which a failure of the father to speak and to act would be regarded

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with horror. A daughter who has recklessly contracted an undesirable marriage with a man utterly unworthy to be the husband of a virtuous woman, against the wish and over the vigorous protest of the father, and who has by such ill-starred union, been brought to wretchedness and humiliation and want of the ordinary comforts of life, may surely be advised, counseled and cared for in the parental home, even against the will and expressed wish of the unfaithful husband."

See also our own case of *Glass v. Bennett*, 89 Tenn., 478.

These cases and others that might be referred to serve to show that because of the relation of parent and child, the right of the one to advise with and influence the conduct of the other, even after the marriage, will not be regarded in the same light as if no such relation existed. And we are of opinion that public policy sanctions such holdings, otherwise, to slightly vary the observation in *Tucker v. Tucker*, a father seeing his young daughter about to marry an unworthy man would be prohibited from using such means as common experience and observation teach every one are but proper to prevent such marriage. To say that a father in such case, that is *before the marriage*, would not be justified in resorting to extreme measures in the way of influencing the daughter would be to say that he must permit her to wreck her whole future, when to use his influence, although it might require extreme measures, would be but doing a parental duty; and in like manner when children of mature years see an aged parent making a similar mistake the policy of the law should justify measures that could not be justified if the parties using them sustained no such relations to the party on whom they were used. Such are clearly the considerations that prompted the decision in the case of *Tucker v. Tucker*, *supra*, as is shown by the language used in that case.

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Of course, after the marriage has actually taken place the same measures should not be permitted to separate the parties as to prevent the marriage, and the cases treating of the right to then intervene simply serve to illustrate how the law regards the rights of the parent toward the child or the child toward the parent in such matters.

Counsel for plaintiff in error cite and rely on Addison on Torts (Wood's Edition), Vol. 1, sections 17 and 41; 38 Cyc., 508; and *Chambers v. Baldwin*, 91 Ky., 11 L. R. A., 545, in support of their contention that such interference with contractual relations and rights as the declaration charges which causes a breach of a contract is actionable; and there can be no doubt but that, speaking generally, this is true, but the authorities relied on by counsel do no more than declare the law generally applicable. They do not involve the exceptional character of case at bar, the interference *with a marriage contract* by one sustaining the relation of child or parent to the party who has been induced to breach the contract.

For the reasons indicated, and without saying or even intimating that if the interference charged in the instant case had been by a stranger or one not bound by the ties existing between parent and child, we are of opinion that the judgment of the trial Court in sustaining the demurrer was proper, and it is affirmed with costs.

Long v. Mickler.

MRS. EMMA LONG v. MRS. MARGARET MICKLER.

Affirmed by the Supreme Court on certiorari.

(Knoxville. May Term, 1915.)

1. WILLS, EXECUTION. *Publication not necessary.*

In the execution of a last will and testament in Tennessee, such as is required to be subscribed by witnesses, it is not required by our statutes and not necessary that the testator declare or make known to the subscribing witnesses at the time of or before the signing of such witnesses that it is his will, that is to publish it; such not being required by common law or statute.

2. SAME. *Position of names of subscribing witnesses on the will, and absence of attestation clause not material.*

The fact that one subscribing witness' name is signed at the bottom of the will on the right side of the paper just under the name of the testator, instead of on the left side, and that there is no attestation clause, is immaterial.

FROM HAMILTON COUNTY.

Appeal in error from the Circuit Court of Hamilton County. N. L. BACHMAN, Judge.

W. B. MILLER for Plaintiffs in Error.

SIZER, CHAMBLISS & CHAMBLISS for Defendants in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

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THE ultimate question for decision in this case is whether, under our statutes, it is necessary for one, in executing a last will and testament that the law requires shall be subscribed by witnesses, to declare or make known to those witnessing it, before or at the time they subscribe their names to it, that it is the last will and testament of the party executing it, in other words to publish it.

It is not necessary to set out in full the will involved here, as no question is made about it except as to the manner of its execution. To show the precise situation in this regard it is necessary to here set out only the last sentence of the document in question, together with what follows it, which are as follows:

"I am in full possession of my mental faculties and voluntarily make this will.

"Witness,

"L. W. LLEWELLYN.

R. N. PHILIPS.

W. W. SPOTTS."

On the hearing in the Circuit Court, where the case was tried before the Circuit Judge and a jury, L. W. Llewellyn and W. W. Spotts were examined as witnesses on behalf of proponent, and by these witnesses it was shown that R. N. Philips had been making his home at the Mountain City Club in Chattanooga for some years preceding and at the time the instrument in question was signed, which was on December 24, 1913, and he had been ill and confined to his room for some days immediately preceding the date the paper was signed. Mr. Philips took the paper first to Mr. Llewellyn, and, exhibiting it, asked him, Mr. Llewellyn, to witness his signature which had already been attached, to which request Mr. Llewellyn

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replied that he did not like to sign anything without knowing what it was, whereupon, according to Mr. Llewellyn's testimony, Mr. Philips said, "Well you know that is my signature", and thereupon Mr. Llewellyn signed the instrument at the request and in the presence of Mr. Philips, signing his name under the word "witness" which was also written on the paper in the position indicated by the portion of the writing just set out. Mr. Philips then, without giving any further information as to what it was he was having signed, took the paper and went into a room near by which was occupied by Mr. Spotts, going directly from where Mr. Llewellyn had signed his name to the room. There he requested Mr. Spotts to sign it, saying that it was his will. It was then so folded that Mr. Spotts saw nothing except the signature of Mr. Philips. Mr. Spotts, on receiving this request and information, signed the paper, signing just under the name of Philips as indicated by the portion herein set out. About a week after this occurrence Mr. Philips told Mr. Llewellyn, the witness who had first signed the instrument, that it was his will which he had signed. The whole instrument it appears was in the handwriting of Mr. Philips except that it was written on stationery of the Mountain City Club, which had printed at the head of it the words "Mountain City Club" and on a line meant for the date the words "Chattanooga, Tennessee" and a blank and "191—" meant for the date. That Mr. Philips was possessed of testamentary capacity at the time the will was executed is testified to by the subscribing witnesses, and not questioned.

On the examination of Llewellyn and Spotts as witnesses before the jury, and when the facts just set out with reference to the execution of the paper had been developed, together with other facts not necessary to be now stated, the paper writing in question was offered in evidence,

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when its introduction was objected to on the ground that its execution had not been properly proven by two witnesses as required by law, and that therefore it was not admissible in evidence. This objection was overruled, and it was admitted in evidence. Both sides thereupon rested; then, on motion of proponent, the trial Court directed a verdict in favor of the will, which was accordingly returned, and pursuant thereto judgment was entered. Contestant appealed to this Court and here assigns as error the action of the trial Court in admitting in evidence the paper writing purporting to be the will, and also the act of the trial Court in directing a verdict, in support of which it is contended that the execution of the paper as a last will and testament had not been sufficiently proven to justify its introduction in evidence, and that, even when introduced, the evidence was not sufficient to justify the direction of a verdict. It is insisted, in other words, that before a last will and testament to which witnesses are required can be properly executed the maker thereof must make known to the witnesses, before or at the time they sign it, that it is his last will and testament.

In 1 Underhill on Wills, under the chapter treating of the execution and attestation of written wills, in Section 180, is found the following: "The statute 29 Car., II., c. 3, commonly known as the Statute of Frauds, required that all devises or bequests of lands or tenements which are devisable under the Statute of Wills or by custom must be in writing and signed by the party devising the same, or by some other person in his presence, and by his direction or request, and that such devise should be attested and subscribed in the presence of the testator by three or four credible witnesses. The provisions of this State have been adopted by necessary implication as a part of the common law or expressly re-enacted in nearly every State of the

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American Union, with the additional requirement, in express terms, in several of the States, that the testator must declare that the instrument is his will in the presence of the attesting witnesses."

Still in the same chapter, and in Section 202 of the same work, it is said:

"In the United States the question whether a testator must, at the time of the execution of the will, publish it—*i. e.*, declare the instrument that he is subscribing is his last will, depends wholly upon statutory regulations. In those jurisdictions where the English Statute of Frauds has been substantially re-enacted, no publication of the will by the testator is required. The witnesses need not know that the instrument which they attest is a will, for the law requires a subscription by a witnesses only in order that the paper which is offered for probate as a will may be then identified as the same instrument which was executed by the testator in the presence of the witnesses."

To the same effect is the law as laid down in 40 Cyc., 1116-7. There, referring to wills, it is said: "Publication signifies the act of declaring or making known to the witnesses that the testator understands and intends the instrument subscribed by him to be his last will and testament", after which it is said: "Unless required by statute publication of a will is unnecessary". These authorities cite many cases in support of the propositions laid down, American and English, including in the list of American cases some from Alabama, Connecticut, District of Columbia, Delaware, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Mississippi, Oregon, Pennsylvania, South Carolina, Vermont, Virginia and Wisconsin. In fact, so well settled is the law that we deem it unnecessary to attempt any review of the cases, but will observe that the

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following will be found to present it in a clear and satisfactory manner: *Osborne v. Cook*, 11 Cush. (Mass.), 582, 59 Am. Dec., 155; *In re Claffin's Will*, 75 Vt., 19, 58 L. R. A., 261; *Watson v. Pipes*, 32 Miss., 451; *Allen v. Griffin*, 69 Wis., 529; *Scott v. Hawk*, 107 Iowa, 723, 7 Am. St. Rep., 228. The case reported in 58 L. R. A., 261, contains a valuable discussion of the question in which both English and American cases are reviewed at some length. We think the law so well settled in accord with the text expressions herein copied that further discussion of that question is unnecessary.

The next question is, does the Tennessee statute require that the testator shall declare the instrument to be his will before or at the time the attesting witnesses sign it?

Our statute bearing on this question is found in Shannon's Code at Section 3895, and is as follows:

"No last will or testament shall be good or sufficient to convey or give an estate in lands, unless written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, neither of whom is interested in the devise of said lands."

It is seen that all that is required of the witnesses is that they subscribe to the will in the presence of the testator and by his direction. This clearly does not require that they should know the contents of the will or even that they should know that it is a will. As shown by the language first quoted from Underhill on Wills the English Statute of Wills required that the witnesses should "attest and subscribe in the presence of the testator," thus including the very word used in our statutes, the word "subscribe," and in addition thereto the word "attest." This use of an additional word might be taken to mean more than merely sub-

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scribe, as is pointed out in the Clafflin case, *supra*, yet, notwithstanding the use of the additional word, the Courts hold under such statutes that it is not necessary for the testator to declare or make known to the subscribing witnesses that it is his will. The Clafflin case and the Osborne case, to which we have made special reference, are directly in point here, as the statutes involved in those cases required that the witnesses attest and subscribe. The same is true of other cases that might be mentioned. Clearly, we think, under no view of the instant case can it be said that the testator was under obligation or had on him the necessity of publishing his will.

It is scarcely necessary to say that the position occupied on the paper by the names of the witnesses and the absence of a regular attestation clause are not material, the evidence clearly showing that it was the intention of the testator to have Llewellyn and Spotts both sign as witnesses, and that it was their intention to attest the instrument as witnesses and not as principals executing it. Pritchard on Wills and Administration, section 218. And it is also scarcely necessary to add that it was not necessary for the testator to sign his name in the presence of the witnesses or that they should sign in the presence of each other, but only that each of the witnesses should sign in the presence of the testator and at his request. *Simmons v. Leonard*, 91 Tenn., 183.

For the reasons indicated we are of opinion and hold that the will was properly executed and attested, and that when both the witnesses had testified to having signed it at the request of the testator and in his presence it was properly proven, there being no controversy as to the facts, and the evidence being sufficient to establish the instrument as a will, there was nothing to submit to the jury; and the trial Court therefore properly directed a verdict in favor of

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the will. It follows that the judgment of that Court is affirmed with costs, and the case is remanded to the Circuit Court from which it came to this Court that it may be by that Court certified for probate in the County Court.

LOUISVILLE & NASHVILLE RAILROAD V. FOSTER BROS.-
BARNETT Co.

Writ of certiorari denied by Supreme Court.
(*Knoxville*. May Term, 1915.)

1. SUBROGATION. *No right to, when payment voluntary.*

One voluntarily paying the debt or obligation of another is not, by virtue of such payment, entitled to be subrogated to the rights of the party so paid to recover from the party whose obligation has been discharged.

2. SAME. SAME. *Carrier's payment of loss resulting from error of agent, not voluntary, when.*

An agent of a common carrier of goods, by erroneous directions, caused goods which his principal had carried to be delivered to another than the consignee thereof, which other, thinking the goods were his, appropriated them to his own use. Upon learning this the carrier paid to the consignee of the goods their value and brought suit against the party appropriating them, seeking to be subrogated to the rights of the consignee whose goods were converted. *Held*, The payment by the carrier not voluntary, and recovery awarded.

FROM KNOX COUNTY.

Appeal from the Chancery Court of Knox County. WILL
D. WRIGHT, Chancellor.

Railroad v. Foster Bros.-Barnett Co.

JAS. B. WRIGHT and **JOHNSON & COX** for Complainant.

WRIGHT & JONES and **CULTON & MORRILL** for Defendant.

MR. JUSTICE HUGHES delivered the opinion of the Court.

COMPLAINANT, Louisville & Nashville Railroad Co., brought this suit in the Chancery Court of Knox County against Foster Bros.-Barnett Co., and by amendment made Rowe Transfer & Coal Co. a defendant; charging that certain goods had been carried by it, complainant, from Atlanta, Georgia, to Knoxville, Tennessee, and by it delivered to Rowe Transfer & Coal Co., which had by mistake delivered the goods to Foster Bros.-Barnett Co., when the goods were in fact consigned and belonged to another, Smith-Harrison Co., and that Foster Bros.-Barnett Co. had appropriated the goods to its own use, and that complainant had paid the real owner and consignee, Smith-Harrison Co., the value thereof; and asking for a decree against Foster Bros.-Barnett Co. and Rowe Transfer & Coal Co. for the amount it had paid, with interest. Defendants answered the allegations of the original, and the amended and supplemental bills, both denying liability, Foster Bros.-Barnett Co. denying that it had received any goods consigned to another, and Rowe Transfer & Coal Co., though admitting that it had received the goods from complainant and delivered them to Foster Bros.-Barnett Co., pleading that delivery was made in accordance with instructions given it by complainant.

On the pleadings, and depositions offered on behalf of all the parties, the cause was heard before the Chancellor, and a decree was rendered dismissing the suit as to Rowe Transfer & Coal Co., but holding Foster Bros.-Barnett Co. liable to complainant for the amount paid, with interest.

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Foster Bros.-Barnett Co. thereupon appealed to this Court, and here makes complaint by two assignments of error; by the first assignment insisting that the Chancellor committed error in finding that the goods in question were the property of Smith-Harrison Co., rather than the goods of Foster Bros.-Barnett Co., the insistence being that the goods belonged to the last named company and were therefore rightfully delivered to it; and by the second assignment insisting that, even if the holding of the Chancellor to the effect that the goods were in fact consigned to, and were the property of, Smith-Harrison Co., and were erroneously delivered to Foster Bros.-Barnett Co., still there was no grounds of recovery, because under such circumstances the payment by complainant to the owner and consignee of the goods was a voluntary payment.

As to the question of fact, we can say that, after carefully reading the record, we think there can be no serious doubt. Smith-Harrison Co. had shipped the goods in question to Poole & Ambrose of Dacula, Georgia, but for some reason they were being returned, or re-shipped, to Smith-Harrison Co., and, by mistake of the delivery clerk of the railroad company at Knoxville in giving directions as to where they should be delivered they were by Rowe Transfer & Coal Co. delivered to Foster Bros.-Barnett Co. The goods were traced from the point of shipment in Georgia to Knoxville, and the evidence clearly shows that in making delivery to Rowe Transfer & Coal Co., which had general authority to receive goods at the depot of complainant and transfer them to both Smith-Harrison Co. and Foster Bros.-Barnett Co., they were designated by the shipping clerk of the railroad company for delivery to Foster Bros.-Barnett Co., rather than to Smith-Harrison Co., and because of that mistake were so delivered.

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On these facts being learned, the railroad company paid to the proper consignee, the real owner of the goods, the value thereof, and then made demand on defendant that it pay to complainant the amount so paid, which demand was refused. It can be said, however, that no blame attaches to defendant for *receiving* the goods, the circumstances under which they were received being such that it rather clearly appears defendant was then under the impression that they were really the property of Foster Bros.-Barnett Co. Still, as a matter of fact, they were not the property of that company, but the property of Smith-Harrison Co., and, the goods being *appropriated* by defendant, it was under obligation to account for their value.

As to the question of law involved, it cannot be disputed, as contended by counsel for defendants, that if the payment to Smith-Harrison Co. by the railroad company was voluntarily made, there can be no recovery, for it is well settled that if one makes voluntary payment there can be no subrogation to the rights of the party who has been paid. *Motley v. Harris*, 1 Lea, 577. Still, one of the questions is, was the payment by the railroad company to Smith-Harrison Co. a voluntary payment? And we are of the opinion that it was not voluntary. The failure to deliver to the consignee was a mistake of an agent or employee of the railroad company, for which the railroad company was responsible. We think it can hardly be questioned that if suit had been brought by the consignee against the railroad company a recovery could have been had, and, of course, if such recovery could have been had, it cannot be said that payment was voluntary. But on this question, and the question of the right to maintain this suit, we are not without authority. In *Sheldon on Subrogation* (2 Edition), section 10, after stating that, "If property in a carrier's possession is lost or destroyed by the fault of

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another, the carrier will, upon satisfying the owners for such loss, be subrogated to their rights," it is said: "So, where a carrier has by mistake delivered to one person goods which had been sold and consigned to another, and the former has appropriated them for his own use, the carrier, after satisfying the real owner for the loss, may recover the value of the goods from the person who has thus received them."

In support of the last quoted proposition, two English cases are cited, *Brown v. Hodgson*, 4 Taunt., 189; and *Coles v. Bulman*, 6 C. B., 184, both of which we find in point, especially the *Brown-Hodgson* case. The facts of that case, as stated in connection with the report of it, are these: "Payne sent butter to London consigned to Pen, by the hands of the plaintiff, a carrier, who, by mistake delivered it to the defendant, and (who) appropriated it to his own use, selling it and receiving the money. Pen had paid Payne for the butter, and Brown, admitting the mistake he had made, paid Pen the value."

On these facts, Brown, the carrier, brought suit against Hodgson, the party receiving the butter by mistake and appropriating it to his own use, to recover the amount paid to Pen. The Court, speaking through Chief Justice Mansfield, held that both the carrier and the party receiving and appropriating the goods were liable to the consignee, the true owner thereof, for their value,—that the payment by the carrier was not officiously made, and that he could maintain the action against the party appropriating them for the amount so paid.

It is also contended that complainant's original and amended bills present inconsistent theories of the grounds of liability. An examination of the pleadings fails to disclose any inconsistency, or any grounds for the conten-

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tion; the original bill simply alleging that the goods were erroneously delivered, while the amended and supplemental bill repeats the charges of the original bill, and then charges in effect that the goods were delivered by the railroad to Rowe Transfer & Coal Co., to be by it delivered to Smith-Harrison Co., and that it, the transfer company, had *reported* that *it* had erroneously delivered the goods to Foster Bros.-Barnett Co., without alleging that in fact the transfer company did make wrongful delivery. This, we think, was no more than presenting the facts as complainant understood them when the original and amended bills were drafted, and presenting them in such way as to recover against both or either of the defendants, as the evidence might show the facts to be. We see nothing inconsistent in the two pleadings, and nothing in the way of applying the propositions of law already herein announced.

There being no error in the decree of the Chancellor, it is affirmed, and complainant is taxed with the costs.

Essary v. Gregory.

J. W. ESSARY, ADM'R, v. G. A. GREGORY, ET AL.

(Jackson. January Term, 1916.)

1. CONTRIBUTORY NEGLIGENCE. *When not imputable, as matter of law, to one travelling defective highway.*

Whether one driving a farm wagon in which were himself, wife and six children, drawn by gentle horses, but one of which was blind in one eye, by continuing his journey after night-fall where the only light was from the stars, along an unfamiliar public highway, which was not in proper repair, and therefore more or less unsafe at one place, but of which condition the occupants of the wagon had no notice, because of which condition the wagon was overturned and one of the children fatally injured, whether such one by such course was guilty of negligence contributing to the injury, was a question for the jury, the traveler on a public highway having the right to assume the highway was safe for travel.

2. DE FACTO PUBLIC OFFICER. *Cannot defend suit for wrongs committed in acting as officer de jure by setting up lack of title to office.*

One who assumes the duties of a public officer, public road commissioner in the case in hand, cannot be heard to defend an action brought against him by a third person for wrongs committed because of and while acting as such officer by urging his lack of title to the office; the assumption of the duties of the office operating as an admission against him.

3. PUBLIC ROAD OFFICERS. *Liable in damages for failure to repair roads only when means available.*

Public road officials are liable to an action for damages for personal injuries caused by defective highways under their control only when they have on hands or accessible money or means to repair the particular defect causing the injury and make all other needed repairs on public highways under their jurisdiction.

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4. **SAME. SAME.** *Recovery only by those possessed of special interests.*

As a prerequisite to a recovery of damages for such injuries as those set out in the last preceding division of this headnote it must be shown that the party suing has a peculiar, private interest in the repairing of the highway, such as is not possessed by him as a member of the general public.

FROM DYER COUNTY.

Appeal in error from the Circuit Court of Dyer County.
JOSEPH E. JONES, Judge.

WILLIAMS & WILLIAMS for Plaintiffs in Error.

ASHLEY & CAMPBELL for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

BEULAH ESSARY, a girl ten and a half years old, met her death as the result of the overturning of a wagon in which she and others were riding in and along a public highway, and J. W. Essary, her father, having been appointed administrator of her estate, brought this suit as such administrator, in the Circuit Court of Dyer County against G. A. Gregory, C. P. Lane and H. J. Strachn, alleging, as a basis of a recovery of damages, that they were public road commissioners, having supervision over the road where the wagon was overturned, and, being charged with the duty of keeping it in repair, assumed to personally look after its being so kept, but negligently defaulted in the discharge of that duty, and that it was because of that default that the wagon was overturned.

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Defendants pleaded not guilty, and the case went to trial before Judge Joseph E. Jones and a jury, when, at the conclusion of the evidence offered on behalf of plaintiff, and on motion of counsel for defendants, a verdict was directed in favor of defendants; the Court basing its action in so directing the verdict on the grounds, as the record before us discloses, first, that the commissioners were assuming to act under a void and unconstitutional statute, and, being without power to act, could not be held liable for any breach of duty in connection with such position; and, second, that they were not shown to have had funds with which to place and keep the road in proper repair; and, third, on the further grounds of contributory negligence of the father now suing as administrator.

The facts given rise to this lawsuit, necessary to be now stated, to dispose of the case, are these: J. W. Essary was removing his residence from Madison County, Tennessee, to Dyer County, and he and his family, consisting at the time of himself and wife and seven children, and a step-son and the step-son's wife, were going to their new residence in farm wagons; Mr. Essary and his wife and six of his children being in one wagon and the step-son and wife and the other children in another wagon. Night overtook them after they reached Dyer County, but before arriving at their destination, though not far therefrom, so they continued their journey. After nightfall and sometime between seven and eight o'clock they were driving along, going at a slow gait, when they came to a narrow place in the road where there was a ditch or washout on one side and a fence on the other, at one particular point along which portion of the road there was a tree standing on that side where the fence was located, the roots of which projected out into the road about eighteen inches, making that side higher than the other side. The evidence as to the

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distance between the tree on one side and the ditch on the other varies somewhat, the distance being, according to some of the evidence, ten to twelve feet, but according to one witness only eight feet. There was no moonlight, and, though there was some starlight, there was shade at the point where the wagon overturned, so that the ditch or washout on the one side of the road could not be seen. Neither Mr. Essary nor anyone else in the crowd was familiar with that part of the road or had so much as been along there for some years. When the team that Mr. Essary was driving reached the point where the tree was, and was "just swinging around the tree," as Mr. Essary expresses it, "they went off into the ditch," and as a result the wagon was overturned and the little girl who was one of the children riding therein was caught under the wagon and killed.

The evidence indicates that one driving along by the place in question, even in daylight, could not avoid the necessity of driving the wheels on one side of the wagon up on the roots of the tree, thus throwing that side of the wagon higher than the other; and it is shown that even then the wheels on the other side of the road, the side next to the ditch, would be within about one and a half feet or eighteen inches of the ditch. It is shown that the team Mr. Essary was driving was gentle, and that he was at the time going slowly, and so far as he could see the conditions, carefully. Mr. Essary was wholly without any information or warning as to the conditions confronting him. It is shown, however, that the horse on the side of the road next to the ditch or washout had but one eye which was on the side away from the ditch, putting the blind eye on the side next to the ditch; and it is insisted that driving along a strange highway at night without a lantern and with a horse in such condition was of itself negligence, and that

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the trial Court properly so held. We are of the opinion, however, as to this one feature of the case, if there were nothing else in it, the question of the negligence of Mr. Essary, or rather his contributory negligence, which the trial Court must have regarded as the contributory negligence of the little girl, or attributable to her, would have been a question for the jury, as one has a right to assume that a traveled public highway is safe for travel. As to the horse's having but one eye, we are of the opinion that it cannot be said, as a matter of law, because of that circumstance there was contributory negligence, in view of the presumption just referred to that the user of a public highway may indulge.

As to the question of authority or want of authority of defendants to act as road commissioners over the particular road in question, we do not regard the matter of constitutionality of the statute under which it is assumed they acted, and under which they possibly did act, as being at all material, provided defendants were acting in the capacity of road commissioners over the road in question at the time of the death of plaintiff's intestate; and there is some evidence tending to show they were. In *Sherman & Redfield on the law of Negligence* (6th Ed.), Volume 2, Section 313, treating of action against public officers for their negligence, it is said:

"A *de facto* officer will not be allowed to urge, in defense of an action against him by a third person for his official acts, that he is not an officer *de jure*. Though his office may be void as to himself, it is valid as to strangers; and if one assumes the duties of an office, his acts will operate by way of admission against him, and strict proof of his election or appointment will not be required."

As to the question of contributory negligence, we are also of opinion that the action of the trial Court cannot

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be justified on that ground because, as already stated, one traveling a public highway certainly has a right to assume that he can safely do so,—and as to the manner of traveling being pursued by plaintiff and his companions on the occasion in question, as already indicated herein, they were going at a slow gait, looking ahead as best they could and keeping within the traveled way. While the horse on that side of the road where the ditch was is shown to have been blind on the side next to the ditch, the evidence is that it could see well out of the other eye, and we think it cannot be said, as a matter of law, that it is negligence *per se* to drive a horse with one eye along a public highway at night. Such a holding would be rather remarkable.

As to the other question on which the trial Court based his action in directing a verdict, that is, that it does not appear that defendants had funds with which to repair or keep in repair the highway, counsel for plaintiff in error does not dispute the legal proposition that unless defendants be shown to have had funds with which to keep the highway in repair they cannot be held in damages, but they insist that this record shows that they did have such funds, as evidence of which they refer to the fact, borne out by the record,—that immediately after the girl was killed by the overturning of the wagon, in fact, the next day after she was buried, there is evidence that one of the defendants, Commissioner Lane, together with others went to the place in question and changed the road so as to make it run on the other side of the tree from where it had formerly run, and so as to put a strand of wire on that side next to the ditch. We are of opinion, however, that the circumstances relied on is no evidence that the commissioners had funds with which they could make repairs, or could have put the road in proper condition. Mr. Essary himself testifies more fully than anyone else as to the re-

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pairing of the road following the death of the child. His testimony is that the little girl was buried on Friday, and that on the next day thereafter, to use his exact language, referring to defendant Lane, "C. P. Lane and others went there and wired this place off and turned the road around the tree"; but it is not in evidence by anyone or even claimed that any other commissioner was in any way connected with the changing of the road, and it affirmatively appears that one of the other commissioners was not in any way connected with it, so it is, the indications are that Commissioner Lane and others of the neighborhood, because of the occurrence of the accident, and acting of their own volition as individuals and not as officials, made the change in the road; and there is no intimation anywhere that anyone was paid for any service rendered in connection therewith. Further, even if we should assume that the fact of Lane's going with others and changing the road on the next day after the burial of the child was any evidence that the commissioners had access to any money or means for that purpose there could certainly arise no inference therefrom that there was sufficient money or means on hands or accessible to the commissioners to repair this place and make all other proper repairs needed in the highway under their supervisions; and the law is as we will show by quotations to now be made, that when road officers have money or means which they can use at their discretion at one place or another on the public highway under their jurisdiction, but are not possessed of and have not access to sufficient money or means to make all needed repairs, then they are left a discretion as to where they will make repairs, and the Courts will not assume to control that discretion to the extent of holding them responsible for having used it at a particular place instead of another.

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In Throop on Public Officers, section 737, is found the following:

"The duty of keeping the highways, roads, and bridges, under their control, in proper repair, is ministerial, and for a failure to perform that duty, they (highway officers) are liable to an action for damages, by any person injured by reason of the insufficiency of any highway, road, or bridge, under their control, provided they have funds at their disposal, sufficient for the purpose of keeping the same in proper repair, but not otherwise. . . . But where the highway officers have funds, but not sufficient funds, or the means to procure sufficient funds, to make all the repairs which are needed, it becomes a matter of judgment and discretion, to determine the repairs which are most urgently needed, and they are not liable for an error of judgment in making such determination."

Still another ground on which we think the trial Court was justified in directing a verdict is that it is not shown, and, of course, it is hardly possible to conceive that it could have been shown, that deceased had any peculiar private interest in the traveling of the road where she was injured, a prerequisite to recovering in this case. As said in Elliott on Roads and Streets (3d Ed.), section 863:

"Where a duty to improve or repair a road or street is an imperative one, *and is one in which an individual has a peculiar private interest* (italics ours) as distinguished from that which he has in common with other members of the community, the highway officer who negligently performs the duty so enjoined upon him must make good to the individual any special loss or damage that he may have sustained, provided the law has placed at the command of the officer the funds necessary to enable him to perform the duty imposed upon him. It is evident that

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justice requires that an officer who has no funds to enable him to perform his duty should not be held liable for a failure to do that which he has not the means of doing without advancing his own money. Essentially the same rule which exempts a public corporation from liability where it has no funds at its command, exonerates a highway officer for failing to do what the law commands him to do."

On the general proposition that before one can recover for a breach of duty to the public, such as the breach alleged in the case at bar, he must show a duty to him personally, see, also, the authority last quoted, section 857; 15 Am. & Eng. Ency. Law (2d Ed.), 412; 37 Cyc., 302; *Cary v. Brown*, 3 Tenn. C. C. A., 399.

It is proper to here remark that we do not regard the authorities we have just referred to and quoted as being at all in conflict with the cases relied on by plaintiff in error in the case at bar. As to the case of *Rhea County v. Sneed*, 105 Tenn., 581, it need but be said that the duty there imposed and for the failure to perform which, that is, the failure of bridge commissioners to take bond from one contracting to build a public bridge guaranteeing the payment for all materials and labor used in its construction, of which the Court was speaking in using the language here relied on, that duty was one imposed under a special statute containing provisions that distinguish it from any statute applicable here. Further, the language there used was wholly dictum. Also *State v. McClellan*, 113 Tenn., 606, another case relied on, involved the liability of a register for failing to properly register a deed where the exact wording of a statute controlled. Further, that case involved a question of liability of one who has received money from another for doing an act he fails to do so that the party suing there had a special interest in the subject

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matter of the suit, an interest different from that of the general public. All the cases relied on are in like manner easily distinguishable from the case at bar.

For the reasons indicated we are of opinion the action of the trial Court in directing a verdict was correct, and it is affirmed with costs.

D. H. WORTHAM V. STATE EX REL. Z. N. ESTES.

(*Jackson*. January Term, 1915.)

1. **CONTEMPT.** *Violation of an injunction issued under Nuisance Act. Reasonable doubt. Criminal aspect.*

While a proceeding in contempt is criminal in its nature and guilt in the lower Court must be established beyond a reasonable doubt, a conviction in the lower Court overturns this presumption, and when the case reaches the appellate Court appellant must show that the evidence preponderates against the verdict.

2. **SAME.** *Whether proceeding be summary. Recitals.*

Where a party has been convicted for violating an injunction issued pursuant to the Nuisance Act of 1913, it is unnecessary to recite all the steps in the proceeding, as the action is not summary.

3. **SAME.** *Evidence. Certified list from United States revenue office. Competency.*

A certified list of holders of internal revenue licenses is not inadmissible because of failure to state the number of pages.

4. **ATTORNEYS.** *Submission of evidence by.*

An attorney may submit to the Court and jury properly verified documentary evidence without being sworn to testify in the case.

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5. CONTEMPT. *Punishment. Costs. Workhouse.*

A party found guilty of contempt may be committed to the county workhouse to work out the fine and costs.

FROM SHELBY COUNTY.

Appeal in error from the Criminal Court of Shelby County. JESSE EDINGTON, Judge.

L. J. MONTEVERDE for Plaintiff in Error.

Z. N. ESTES for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

THIS proceeding grew out of a suit brought in the Criminal Court of Shelby County on the relation of Z. N. Estes, Attorney General, under Chapter 2, Acts of the Second Extra Session of the Fifty-eighth General Assembly of Tennessee, popularly known as the "Nuisance Act," and has for its purpose the punishment of plaintiff in error, D. H. Wortham, for an alleged contempt of Court committed in violation of an injunction granted in that suit.

The bill or petition in the original proceeding, the one out of which this contempt proceeding grew, was filed on June 9, 1914, and charged D. H. Wortham, the plaintiff in error in the matter now before this Court, with conducting, maintaining, carrying on, and engaging in the sale of intoxicating liquors in violation of law at the southeast corner of Monroe Street and Wellington Street, in the city of Memphis, and prayed, among other things, that he be enjoined from further engaging in that business in Shelby County. Process was duly issued and served on Wortham notifying him that on a given date the Judge

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of the Criminal Court would hear the application for an injunction, and that, pending the said application, he, Wortham, was enjoined and forbidden from engaging in the sale of intoxicating liquors in that county. It is then recited in the minutes of the Court that the case came on to be heard before the Criminal Judge upon the original bill and answer of defendant, and oral testimony of witnesses, and that, it appearing a temporary injunction should issue, such be done and Wortham be restrained from selling or tippling intoxicants in violation of law in the State of Tennessee until further orders of the Court; and it was also ordered that Wortham's place of business at the southeast corner of Monroe and Wellington Streets in the City of Memphis be closed, and Wortham be enjoined from entering those premises and removing therefrom any intoxicants or other articles. Then, on a later date, the exact day not being shown, another minute entry was made reciting that, it appearing defendant had removed from his premises all intoxicating liquors and means used for the purpose of selling or tippling intoxicants, it was agreed by counsel and ordered by the Court that the decree previously made ordering the property closed, be so modified as to allow defendant to open his premises and conduct therein a business not forbidden by law; and in the same order it was further recited as follows: "It is also agreed between counsel and ordered by the Court that the temporary injunction heretofore granted restraining the defendants from selling intoxicating liquors in violation of the laws of Tennessee is hereby made permanent."

The next step in the proceeding, as shown by the record before this Court, is a petition presented to the Judge of the Criminal Court of Shelby County, setting out that Wortham had violated the injunction of the Court by selling intoxicating liquors in violation of law "at said place,

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363 Monroe, Memphis, Shelby County, Tennessee," and praying an attachment for the body of the defendant. That petition was filed on September 12, 1914, and pursuant thereto an attachment was ordered and issued for the body of Wortham that he might show cause why he should not be "fined and committed according to law," under which writ Wortham was taken into custody by the sheriff of Shelby County. Next appears a minute entry in the case which recites that the parties, the Attorney General and the defendant, appeared before the Court when the charge of contempt was duly heard, and that, the Court "having been duly advised in the premises, adjudges the defendant guilty of contempt as aforesaid." Then, after some delay, on October 3, 1914, Wortham was adjudged to pay a fine of \$50.00, and it was ordered that he be delivered to the keeper of the workhouse to be confined therein for a period of six months and until he should pay or work out or secure the fine together with all costs. Wortham thereupon prayed and was granted an appeal to this Court, and here he, by five assignments of error, complains at the action of the trial Court; but before taking up and dealing with these assignments it is proper to remark that the point has been made by counsel for the State that the bill of exceptions was not filed within the proper time. On looking to the record we find that Wortham was found guilty of contempt on September 15, 1914, but that sentence was not pronounced until October 3rd. On that date he was allowed fifteen days in which to file his bill of exceptions, and thereafter on different dates the time for filing the bill of exceptions was extended until, adding the time included in all the extensions, he was given until February 23, 1915, or four months and twenty days, in which to file his bill of exceptions, which was finally filed on the last day fixed therefor. Yet, notwithstanding this long extension of time,

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it does not appear in the record whether the last extension was made at the same term at which judgment was finally pronounced; and, this being a proceeding in the nature of one to punish for crime, this Court will indulge the presumption that the trial Court made no order extending time that was beyond its power to make. We will therefore proceed to take up and consider the different assignments of error.

The fifth assignment will be first considered. By it complaint is made of the admission in evidence, over the objection of plaintiff in error, of a certified list of the holders of Internal Revenue licenses in Memphis, Shelby County, Tennessee. The grounds of the objection to the evidence relied on below, and repeated here, are, first that counsel who read the list to the trial Court was not under oath when he did so; but no authorities are submitted in support of the contention that for any such reason it should not have been so offered, and we are not surprised at that fact, but would be surprised if authorities were cited. A holding that sworn attorneys, as all attorneys are who practice before the Courts of Tennessee, must act under another and special oath in order to be competent to read a paper to the Court is to us a new and somewhat unusual proposition. Of course there is nothing in it. The second reason why it is said the certified list was incompetent is that the certificate was insufficient in that it failed to state the number of pages contained in the list, but again no authorities are cited, and we assume that this contention is not seriously made. Our statutes have made such certificates competent, and they have been so treated by our Supreme Court in the cases of *Diamond v. State*, 123 Tenn., 348, and *Brinkley v. State*, 125 Tenn., 371; so the fifth assignment of error must be overruled.

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Another contention made in the case, though not itself the basis of a separate assignment of error, but which will be considered here, is that, treating the certified list as competent, still it shows that Wortham was licensed to do business at 363 Monroe Avenue, while there was nothing to show that that number is the same as the southeast corner of Monroe and Wellington; and it is true there is no direct evidence identifying the one with the other, but on the trial below they were treated as such, and it is too late to now make the question.

The first assignment of error, to which we will now pass, is that the evidence does not establish the guilt of appellant beyond a reasonable doubt, under which assignment it is insisted that this being a criminal case the rule requiring guilt to be found beyond reasonable doubt applies, and the case of *Black ex rel. v. State*, 130 Tenn., 529, is cited and relied on. The case referred to simply goes to the extent of holding that in a suit under the Nuisance Act to abate the nuisance,—not in a suit to punish one for a contempt on a charge of violation of an order of injunction in a nuisance case, the Court of Civil Appeals on an appeal to it should find the facts from a preponderance of the evidence independent of the findings of the Circuit Court; that holding being based on section 5 of the Nuisance Act. On referring to that section, however, we find it has no application to the hearing on a charge of contempt for violating the injunction of the Court in a case brought under the Nuisance Act, and that no other part of that enactment contains any such provision, so that clearly the case of *Black v. State* cannot be controlling here.

The question then arising is, how shall this Court regard the case here? That is, first, whether the fact that the trial below was on oral testimony prevents this Court from re-examining the question at issue as if it were trying the

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case *de novo*; second, whether, aside from the question of the evidence being heard orally in open Court below, the question should be here examined with a view of ascertaining where the weight of testimony is; or third, whether, as is insisted by counsel for Wortham, the proceeding being in the nature of a criminal action, the defendant shall be given in this Court the benefit of all reasonable doubt in weighing testimony; or fourth, whether as in ordinary criminal cases this Court will weigh the evidence as an Appellate Court weighs or should weigh evidence on appeal in a criminal case, which rule as announced in *Cooper v. State*, 123 Tenn., 37, is that a verdict of guilty approved by the trial Judge removes the presumption of innocence and raises a presumption of guilt which the accused must overcome in order to obtain a reversal of the facts.

We are of opinion that the rule last named should here prevail, and the following considerations have impelled this view: First, even if the investigation in the Court below as to whether Wortham was guilty of the matters charged in the petition to punish him for contempt be viewed wholly and from every angle as a proceeding in equity (though we do not mean to say that it should be so viewed), it appears that the doctrine in the case of *Beatty v. Schenck*, 127 Tenn., 63, would apply; the rule referred to being that where a suit in equity has been heard before the Chancellor on oral testimony, on appeal the parties are not entitled to have a re-examination of the whole matter of law and fact, because such hearing on oral testimony is not according to the forms of the Chancery Court, and that therefore the rule requiring a re-hearing *de novo* in Chancery causes does not apply under such circumstances.

Clearly the proceeding to punish for contempt in this character of case is in the nature of a criminal action, and

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we think should be treated as such so far as the weighing of testimony by an Appellate Court is concerned, which, as already indicated, is one where the presumption of innocence has been removed and the presumption of guilt has been raised and is to be overcome in order to obtain a reversal on the facts. In support of this view as to how this Court should view the case and weigh the testimony, we refer to 1 Joyce on Injunctions, Section 263, where the following is found:

“The primary purpose of proceedings for contempt is not to afford a remedy to the party complaining, and who may be injured by the acts complained of. Its purpose is to vindicate the authority and dignity of the Court. Contempt proceedings are, however, of two kinds: civil, or remedial, when instituted for the purpose of affording relief between the parties to a cause in Chancery, and criminal in their nature, when having for their object the punishment of an offense against the authority and dignity of the Court. Where the contempt proceeding is criminal in its nature it is unimportant whether injury to the complainant is shown by the violation of the injunction. Where a contempt proceeding for violation of an injunction is to afford a remedy to the party complaining, it is civil and not criminal.”

See also *Brooks v. Fleming*, 6 Bax., 331, where in speaking of an inquiry as to an alleged contempt committed in violation of an injunction by acts in the presence of the Court, it was said: “The inquiry is in the nature of a criminal proceeding, under which the accused may be deprived of his pocket by fine, and of his liberty by imprisonment.”

See also 3 Encyc. Evidence, 439, and cases there cited, particularly the case of *State v. Massey*, 10 N. D., 154, 80

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N. W., 225, which was a proceeding to punish for contempt one who had violated an injunction by selling intoxicating liquors under a statute very similar to ours, and where it was held that the contempt proceeding was criminal in its nature.

Testing by these rules and bearing in mind that in the instant case, which has for its object the punishment of Wortham for an offense against the authority and dignity of the Court granting the injunction, and that too in a suit where the proceedings are as in equity, and that the question of whether or not the Attorney General or the State had suffered as a result of the alleged acts committed in violation of the injunction was and is unimportant, and that the proceeding is not for the purpose of affording a remedy to the complainant, and that the acts alleged to have amounted to a contempt were not committed in the presence of the Court, we think there can be no question but that the evidence should be looked to here as if this were a criminal case.

Then treating the case now before this Court as a criminal proceeding on appeal where the presumption of innocence has been removed and the presumption of guilt prevails, the question is, is there sufficient evidence to support the finding of the trial Court? On this question it is necessary to say but little. In addition to the certified list of those holding licenses to do the business of liquor dealers, there was the testimony of one R. E. Wilroy who testified that on September 9th he went to the place of business of Wortham and there found what he calls "a regular saloon—bar-room", and a crowd of people there buying drinks; that he found iced beer and keg beer on tap; that one fellow was drinking out of a bottle, and another fellow got a bottle of beer; that bottled beer was found under the counter on ice; that there was draft beer

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and whiskey in bottles, and that he heard men call for beer. This evidence was not denied, and we do not see how it can be seriously said that with such evidence against Mr. Wortham he is not shown to be guilty.

The second assignment is that the judgment rendered by the Court in this contempt proceeding is invalid because it does not state upon its face the cause of contempt alleged, in support of which contention *State v. Galloway*, 5 Cold., 337, and *Warner v. State*, 13 Lea, 89, are cited. This contention grows out of a misapprehension of the exact point of the holdings in the cases referred to, as compared to the character of the proceeding at bar. The case of *State v. Galloway* was a proceeding to punish for contempt it is true, but it was also one, unlike the instant case, from which no appeal lay; and, as clearly appears from a reading of the opinion, that is a case where the proceeding was by motion. In other words it was a summary proceeding, while the case at bar is not a summary proceeding, but is one where the offenses with which Wortham was charged in the Court below were set out in a petition duly sworn to and filed in the case, and where he was given an opportunity to make defense by answer. Bearing these matters in mind the following quotations from the Galloway case become quite pertinent:

“If the judgment for the contempt be for cause for which the Court has not jurisdiction, and it so appears upon the record, the judgment is void, and is no justification for the imprisonment. It stands on the law of universal application to the judgment of Courts, that if the Court has no jurisdiction, the judgment is void. If, therefore, it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered, that the judgment is upon a cause of contempt, for which the Court has no statutory power to punish, or if it so ap-

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pears that the punishment inflicted is not within the power prescribed by statute for such cause, the judgment will be void for want of jurisdiction of the Court, and will be no justification for the imprisonment or sentence, and no sufficient answer to the writ of *habeas corpus*. . . .
“At common law, a general judgment for contempt, that is a judgment which does not specify the particular cause of contempt on which the judgment is founded, is held to suffice and be valid: See Summer’s case, 5 Iredell’s Rep., and authorities there cited. From this rule of the common law, we think proper to depart, to the extent to require that in the Courts of this State, it shall be essential to the validity of a judgment for contempt *of the kind under review here*, that it shall state upon its face the cause of contempt alleged, *as the ground of jurisdiction on which the judgment is rendered.*” Italics ours.

It is seen by the words we have italicized that the rule announced in the Galloway case applies only to cases of the kind there under review, and it is seen that the reason for the rule there applied was that the ground of jurisdiction on which the judgment was rendered might be shown. Of course where there are regular proceedings the ground of jurisdiction appears in the pleadings, and it is only in summary proceedings that it is necessary to set out the grounds in the judgment. So the holding in the case referred to is but the application of a very, very familiar rule of law, which rule is, as stated in the first division of the syllabus in *Hamilton v. Borum*, 3 Yerg., 354: “This principle holds in all summary proceedings, that whatever gives jurisdiction must appear on the face of the record, otherwise the judgment will be void,” a principle which has been announced and applied in Tennessee as often as any other legal principle. See many cases cited in 9 Encyc. Dig. of Tenn. Reports, page 213.

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The case at bar, as already observed, not being a summary proceeding, but one in which a petition was filed making the charges on which it was sought to punish Wortham for contempt, of course that rule does not apply, and the case of *State v. Galloway* can have no kind of application. As to the case of *Warner v. State*, 13 Lea, 89, it can be observed that what is there said is merely the observation in a dissenting opinion; but if it be regarded as a sound expression of the law, still it also has reference to the necessary recitals in a judgment obtained in a summary proceeding.

By the third assignment of error complaint is made of the judgment of the trial Court imposing a fine of \$50.00 and a sentence of six months in the county workhouse, and directing that Wortham serve until that time had expired and the fine of \$50.00 and costs were paid, secured or worked out. The contention is that if Wortham violated any injunction it was only a temporary injunction, and that under our Nuisance Act no such punishment could be imposed. This contention is based on the assumption and contention that there was no valid permanent injunction, yet the record in the case before us discloses that, after the temporary injunction had been in force, and on it appearing to the Court that "all intoxicating liquors, fixtures and other means exclusively used for the purpose of selling or tippling intoxicating liquors" had been removed, it was *agreed* by counsel, and ordered by the Court that the previous order of injunction be so modified as to allow defendant Wortham "to open said premises and to conduct therein any business not forbidden by law", and that it was at the same time "also *agreed* between counsel and ordered by the Court that the temporary injunction heretofore granted restraining the defendant from selling intoxicating liquors in violation of the law of Tennessee

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is hereby made permanent". Counsel it is true do not overlook the fact that the order just referred to was made, but insist that no answer had been filed and there was no hearing, and that therefore no permanent injunction could have been or was legally granted. It needs no argument or citation of authorities to support the proposition that when counsel agree to such order in a case where the Court has already acquired jurisdiction, as it had acquired in the instant case, the order is valid.

The fourth assignment of error is that the Court exceeded its authority in adjudging that appellant pay or work out the costs of the proceeding. That one convicted under an offense criminal or semi-criminal, such as is the offense committed by Wortham, may be subjected to such penalty, see *Knox County v. Fox*, 107 Tenn., 724.

This disposes of all the contentions made by and on behalf of D. H. Wortham, and all of the contentions being found untenable, and his assignments being overruled, the judgment of the lower Court is affirmed with costs.

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PARTNERSHIP. *Dealings with member as an individual.*

Where a party has dealings with a member of the firm as an individual, constituting the individual an agent for the transaction of business not connected with the partnership, the partnership cannot be held liable for moneys and property wrongfully disposed of by the individual member while carrying out the separate enterprise.

FROM DAVIDSON COUNTY.

Appeal in error from the Second Circuit Court of Davidson County. GARLAND S. MOORE, Special Judge.

PARKS & BELL for Plaintiff in Error.

G. N. TILLMAN for Defendant in Error.

MR. JUSTICE HUGHES delivered the opinion of the Court.

L. D. AGEE, having a promissory note for \$595.15, payable to him, signed in the firm name of Everett Philpot & Co., brought this suit before a Justice of the Peace of Davidson County against Everett Philpot, Howell Brandon and C. C. Woodcock to recover thereon, under the assumption that the parties sued composed the firm of Everett Philpot & Co., and were liable for the payment of the note. The warrant was served on Woodcock and Brandon alone, being returned "not to be found" as to Philpot. Woodcock filed his plea, alleging that the note was not executed by him or by any one authorized to bind

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him, and the case went to trial before the Justice of the Peace, with the result that judgment was there rendered against Woodcock and Brandon. Both parties appealed from that judgment, and in the Circuit Court the issues were found against Brandon, but in favor of Woodcock, and judgment was rendered accordingly. Plaintiff then made a motion for a new trial, and it being overruled, appealed to this Court, and here assigns errors, complaining of the action of the trial Court in finding and adjudging in favor of Woodcock.

The case was tried in the Circuit Court before Hon. G. S. Moore, sitting as Special Judge, and in response to a written request therefor he reduced his findings of fact to writing.

The material and controlling findings are to the effect that plaintiff Agee, in the latter part of the year 1912 owned a farm near Fosterville, Tenn., which he desired to sell, and with that end in view placed it with a real estate firm, Stratton & Morton, which later turned the matter of selling the farm over to defendant Woodcock, also a real estate agent; that Woodcock thereafter in an effort to sell the farm, took a Mr. Rouzee to see the farm, and with the aid of Philpot, one of the parties originally sued, succeeded in closing a trade between Agee and Rouzee for the farm at the price of \$6,500; that Mrs. Rouzee, wife of the man to whom the lands were contracted, gave to Everett Philpot & Co. a check drawn payable to Everett Philpot & Co. for \$1,000 toward paying the purchase price of the farm; that there were two mortgages on the farm when contracted to Mr. Rouzee, one for \$2,500, the payment of which was assumed by Mr. Rouzee, and another to A. L. Todd of Murfreesboro, on which there was due \$557. "That it was understood by and between Clarence (C. C.) Woodcock, Everett Philpot, L. D. Agee, and T. B.

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Rouzee and wife that this amount of money, \$557.00, would be reserved by Everett Philpot out of the first cash payment of \$1,000 and paid over to A. L. Todd to clear up this mortgage;" but "that the amount of money, \$557.00, left with Philpot to pay off the Todd note was never paid to Todd by anyone of the said firm." The findings of the Court indicate that the \$1,000 paid by Mrs. Rouzee, out of which was to be paid the money going to Todd, was paid about the time the trade was closed, which was in December, 1912, and that the failure to make payment to Todd occurred, although Todd called on Everett Philpot & Co. for the money, and that because thereof, Agee himself settled with Todd, on doing which he, Agee, wrote to Philpot & Co. and asked that that firm send its thirty, sixty or ninety-day note as best suited it, and that *Everett Philpot*, about February 28, 1914, executed a ninety-day note, payable to Agee, signed Everett Philpot & Co., that that note, not being paid at maturity, Philpot, in May, 1914, renewed it, giving the one sued on, and on its not being paid this suit was brought. The Court further found that "Clarence Woodcock knew that Rouzee and wife had left with Everett Philpot \$557.00 to pay Todd, but he did not know that Philpot had failed to turn over the money to Todd, neither did he know that Everett Philpot had executed a note to Agee about Feb. 28, 1914, and a renewal of same on May 28, 1914;" and also found that "Everett Philpot signed the firm name of Philpot & Co. to the note without the knowledge and consent of defendant Woodcock, neither did he (Woodcock) authorize anyone to sign or execute said note;" and found that Woodcock did not know of its execution until about August, 1914; and concluded as a matter of law that the execution of the note did not bind Woodcock. He found that it was beyond the scope of the partnership which was engaged in

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the business of a real estate and fire insurance agency. It was found the firm did not buy real estate on its own account, but engaged only in selling real estate on commission. To use the Court's own language the partnership was an "occupation or employment" one, and not "a commercial or trading" one. The Court was specially requested to modify its finding of facts so as to find that the understanding between Woodcock, Philpot, Agee, Rouzee and wife was that the money would be reserved by *Everett Philpot & Co.*, rather than *Everett Philpot*, and paid over to Todd out of the first \$1,000 and to find that the \$557.00 was left with *Everett Philpot & Co.* to pay Todd, rather than to *Philpot* alone, as the Court found; but the Court refused to modify his former findings in those regards. In other words, the Court had already found that the understanding among the parties, including plaintiff Agee, was that the \$557.00 would be reserved by Mr. Philpot out of the first \$1,000, and paid to Todd, and that the money was in fact left with Mr. Philpot to pay to Todd; and when asked to find that the understanding was that the money should be reserved by Philpot & Co., and that it was left with Philpot & Co., to be paid to Todd, the Court refused to modify his former findings, thus showing, when the matter was called sharply to his attention, that he deliberately found that the agreement was that the money would be left with *Mr. Philpot* and not with Philpot & Co. to pay to Todd.

Under this state of facts one of the assignments of error, the eighth, is to the effect:

"There is no competent evidence in the record to sustain the finding of fact by the Court that the \$557.00 of the money belonging to plaintiff, and paid into the firm of Philpot & Co. was left with *Everett Philpot*."

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The ninth assignment is that the Court erred in finding as a fact that it was understood by Woodcock, Philpot, Agee and Rouzee and wife that the \$557.00 would be reserved by Mr. Philpot out of the first \$1,000, and paid to Todd; and by that assignment it is insisted that there is no evidence in the record that the \$557.00 was ever paid to Mr. Philpot or placed to the credit of Mr. Philpot, but that the uncontradicted evidence is that the money was paid to and left with Everett Philpot & Co.

These assignments of error, we think, are conclusive of the whole question, for the reason that, as already indicated, the trial Court found, when his whole findings are considered together, that the \$557.00, part of the \$1,000 which had been paid to Everett Philpot & Co., had been, as the result of an agreement to which complainant Agee was a party, placed with Everett Philpot, rather than with the firm, to be by *Philpot personally*, and *not by the firm*, paid to Mr. Todd in discharge of an obligation that Agee owed to Mr. Todd. Of course, if Agee was a party to an agreement by which his money was placed in the hands of Mr. Philpot as an individual to be used by him alone, rather than by a firm, in discharging an obligation of Mr. Agee, then Mr. Philpot alone would be responsible for a breach of his duty in that regard, although the money might have originally been paid to Everett Philpot & Co. In other words, treating Mr. Woodcock as a member of the firm of Everett Philpot & Co., and even conceding that the \$1,000, or all the purchase money as to that matter, was paid to Everett Philpot & Co., still if \$557.00 of that money was later, by the consent of Agee, placed with Everett Philpot as an individual to be used by him in discharging an obligation of Agee, then his failure to discharge such obligation would be a breach of his personal obligation, and not a breach of any obligation of his firm,

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and, of course, if he breached his personal obligation he could not thereafter execute a note in the firm name and bind the firm for such breach. So we think the whole case hinges on the one question of whether there was any evidence to support the finding that the money was left by Agee, or with his consent and approval, with Mr. Philpot, as an individual to be by Mr. Philpot as such individual paid to Mr. Todd. The controlling question then is, was there any evidence to support that finding?

A reading of the record discloses the following evidence bearing on this question: After Mr. Woodcock had taken Mr. and Mrs. Rouzee to look at the farm of Mr. Agee, and after he had succeeded in getting the parties to agree on the terms of the sale, Mr. Agee went to Nashville where Everett Philpot & Co. had an office, and on that trip the \$1,000 check was paid by Mrs. Rouzee to Everett Philpot & Co. That was in December, 1912, and a few days thereafter Mr. Agee wrote to the firm of Philpot & Co., for some money, and received in reply \$500.00. Then, on January 5, 1913, he received a letter in regard to the same matter, apparently in answer to one he had written on January 2d, and that letter was to this effect: "*I expect to go to Murfreesboro one day this week and will arrange our little matter with Todd,*" and was signed by Everett Philpot alone, and not by the firm, though it was written on the firm's stationery, and though Mr. Agee swears that he left the money with Philpot & Co., and that it was agreed that the firm would take the money and settle the note with Mr. Todd. So it is seen that here is a circumstance indicating to some extent, though perhaps but slightly, that Mr. Philpot was treating the matter as a personal one. Then Mr. Rouzee testified that Mr. Agee left the money, without saying with whom, for the purpose of paying off the indebtedness to Todd.

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Mr. Woodcock testified as follows on the question now under consideration:

"I knew about the note to Mr. Todd, that was held by Mr. Todd against this place, and I knew that a part of the purchase money had been left with Mr. Philpot, Everett Philpot, to pay off that Todd note after he had practically closed the deal and this matter was still outstanding, and Mr. Agee said—there was some discussion about this matter, that is, the money owing Mr. Todd, and Mr. Philpot said, "You just leave the money with me and the matter will be straightened in that way." Mr. Agee leaves the money with Mr. Philpot to pay out at a certain time to Mr. Todd, and at that time I just dismissed the matter from my mind, and I don't know of any receipt given by Philpot for the money that was left to be paid to Mr. Todd, and if he gave a receipt of any kind of an obligation to Mr. Agee to pay off that Todd note I knew nothing of it, and I first heard of this note that is sued on in this lawsuit was when Mr. Agee called me up over the telephone and found me one afternoon; he talked a minute and asked me what about Philpot, and I said just what do you mean, and he said is it true he has disappeared, and I said it is. He seemed to be very much surprised that Mr. Philpot had disappeared, and then he said, 'What about that note,' and I said, 'What note,' and he said, 'You remember about that note,' and I said, 'Yes,' and he said, 'What are you going to do about it,' and I told him that I didn't feel obligated in any way to do anything about it, thinking that he had reference to the note he owed Mr. Todd, and the reason I said that was I knew nothing of the other note. Mr. Agee said he was positive what note was on my mind, but I not knowing anything about the two later notes, he could not positively know what was on my mind, and the note that I supposed he was talking

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about was the note that Todd held and that Mr. Philpot was to pay off, and I knew nothing of the execution of this note at that time, and I knew nothing of the execution previous to that time in February of the similar note of which this note sued on was a renewal."

Mr. Woodcock testified further as follows:

"Everett Philpot signed that note without my authority and the note of which this was a renewal, executed in February, was signed Everett Philpot & Co., without my authority, and I am acquainted with the signature of Everett Philpot and he signed both of these notes, the renewal and the original."

Again he said: "That thousand dollars was not left in my hands; it was left in the hands of Everett Philpot."

It is seen that, according to the testimony of Mr. Woodcock, the money was left, not with Everett Philpot & Co., but with Everett Philpot, and left with him for a specific purpose, that is, to pay Todd; and the trial Court having believed this testimony and found as a fact that the money was so left, we see no theory of law on which Woodcock could be held liable for the money thus left with Philpot, whether they were partners or not partners; and whether the money was originally paid to Philpot & Co., or not so paid to them could make no kind of difference if the money was by the consent of Agee placed in the hands of Philpot alone for the purpose of being by him paid to another.

We regard it wholly unnecessary to enter into any discussion of the authorities, as the finding of fact referred to is conclusive of the whole case; but it is proper to say that one of the assignments not heretofore referred to challenges the correctness of a ruling of the trial Court on an exception to evidence, by virtue of which ruling evidence was admitted as to an agreement between Everett Philpot

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and others with reference to a division of commissions earned in the sale of the farm. Of course, if the Court had committed error in the admission of testimony which was material, such error should be considered, as in that event the Court might have decided the case on the testimony improperly admitted; but in this case we think the assignment challenging the action of the Court in the admission of the testimony must be overruled for two reasons: First, by virtue of one of the rules of practice adopted by our Supreme Court and now prevailing in this Court the assignment cannot be considered, the rule of practice is as follows:

“When the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected, with citation of record where the evidence and ruling may be found. When the error alleged is upon the charge of the Court, the part complained of, whether it is instructions given or instructions refused, shall be set out.” 18 Cates, 722.

The assignment of error under consideration does not pretend to comply with this rule; and it can here be further said that the motion for a new trial did not point out the alleged error in the manner required by the rules of practice now prevailing in this Court, the motion failing to specifically point out the evidence it is said the trial Court improperly admitted. See 18 Cates, 723.

A second reason why the assignment must be overruled is that the evidence admitted was or became wholly immaterial in the face of the finding that the \$557.00 was entrusted by Mr. Agee to Mr. Philpot as an individual to pay to Mr. Todd. As already herein observed, the fact that a partnership existed between Philpot and Woodcock became immaterial in the face of the finding that the money was entrusted to Philpot as an individual and not as a

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member of a firm. It might be here further observed that the Court found the existence of the partnership, and the excluded evidence could have only borne on that question. So from this viewpoint no harm could have been done Agee by the Court's ruling.

It becomes unnecessary to consider the other assignments for the reason that those already considered become absolutely conclusive of the whole case; and the result is the judgment of the lower Court is affirmed.

T. S. MERCER v. R. L. EWING.

Affirmed by the Supreme Court, 1916.

1. PRACTICE. *Appeals from Justices of the Peace. Estoppel to deny.*

Although there is no entry on the warrant of an appeal prayed and granted from the judgment of a Justice and no oath or bond for costs, the parties will be estopped after entering upon trial in the Circuit Court to deny that an appeal was taken.

2. ANCILLARY ATTACHMENT. *Amendment.*

The affidavit for an ancillary attachment and the writ may be amended by inserting therein the grounds upon which the attachment is sought. It might be different as to an original attachment.

3. SAME. *Void or irregular attachment. Effect of executing bond.*

Where the defendant in an attachment executes after levy a bond manifesting an intention to substitute personal liability for the property attached, and where the defendant and his surety obligate themselves to pay any judgment that may be

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rendered against the defendant, the defendant will be held to have waived all defects in the attachment proceedings up to the time of the execution of the bond.

4. **NEW TRIAL.** *Newly discovered evidence. Rule as to.*

Before a Court will be warranted in granting a new trial for newly discovered evidence, it should be made satisfactorily to appear that had the evidence been adduced a different result would have been reached.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Part IV. H. W. LAUGHLIN, Judge.

T. F. KELLY for Plaintiff in Error.

W. G. CAVETT for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

On the 12th day of February, 1915, defendant in error Ewing commenced a suit against Mercer before a Justice of the Peace for damages claimed to have been sustained by him in an automobile collision. He also filed an affidavit in which he prayed for the issuance of an attachment to accompany the summons. The summons contained a statement that damages were claimed because of collision with an automobile, but had no averment as to when or where the collision took place. The attachment was utterly silent as to the grounds upon which it was sought; and another singular thing is that this process was issued against the estate of Mercer generally and did not in any respect authorize or direct that it be levied on the automobile that did the damage.

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The summons was regularly served and trial set before a Justice of the Peace on the following 17th of the month. The attachment was executed by levying the same on a certain automobile owned by Mercer, which machine we shall treat as being the one used by Mercer at the time of the collision. We learn from an inspection of the record that a trial in regular course was had before the Justice. He rendered judgment for plaintiff for \$150.00, and also found that the attachment was *authorized*.

It was stated that an appeal was taken to the Circuit Court. But there is not an entry on any document showing that this step had been taken. There is not even a cost bond, so far as we have been able to ascertain, and there is not a suggestion that an appeal was prayed and granted. We seriously doubt whether the cause ever reached the Circuit Court, and we would ourselves direct dismissal of this case for lack of jurisdiction in the lower Court but for the conduct of appellee in treating the case as having been appealed to the Circuit Court.

We specifically direct attention to the status of the case as it was developed or rather left before the Justice, for the reason that certain omissions therein shown have a material bearing upon our disposition of the case. There is nothing in the record to disclose whether the defendant made a motion before the Justice to quash the attachment. But we are bound to presume that he did not file any plea in abatement, for the reason that the plea which we find in the transcript was not filed until after the case was docketed in the Circuit Court. We observe in this connection that the plea in abatement was filed before the case was heard, and, as we shall assume, before any motion was made to quash the attachment for defects to be hereinafter pointed out. This plea distinctly averred that Mercer was not running his machine unlawfully at the time of the collision,

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and this statement was inserted for the specific purpose of raising the issue as to whether the automobile was being run contrary to law and in such way as to create a lien under the Act of 1905. Plaintiff below evidently proceeded throughout upon the idea that he had this lien, and he doubtless thought he was pursuing the statute and the law which authorized the issuance of an attachment, and the plea in abatement was simply a challenge of the right to the attachment or rather an assailment of the grounds of attachment.

The case was tried by Judge Pitman alone. Just before the submitting of the proofs learned counsel for Mercer moved that the attachment be quashed because both it and the affidavit upon which it was issued were fatally defective, in that there was a failure to state any ground upon which an attachment could be issued. Before the question was ruled upon, defendant in error was allowed to amend the affidavit by a recital that the automobile was at the time being operated in excess of twenty miles per hour. At this juncture counsel for Ewing also asked the Court for permission to amend his original summons so as to state that the collision had taken place at a point in Memphis and at a specified time.

Mercer had filed a counterclaim. The several matters of fact were heard by the Circuit Judge, with the result that plaintiff below was given a judgment for \$125.00 against the defendant and the surety upon a replevy bond which defendant had given when the Justice's attachment was served. There was simply a straight judgment against the defendant and his surety for the amount of the judgment and costs, followed by a recital that the attachment was sustained. Mercer has appealed and assigned errors. We shall treat of assignment of error number four first.

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In this assignment it is contended that the Court was in error in pronouncing judgment against the surety upon the replevy bond. It is urged that the attachment was absolutely void, or so lacking in substance as not to be susceptible to amendment, and that the bond given was also void. It is contended by defendant in error that Mercer and his surety are estopped to question the regularity of the attachment proceedings, and are not in position to insist that the attachment was irregular or void.

We have reached the conclusion after mature deliberation that the position of defendant in error is sound. Our decision is based upon the peculiar phrasology of the replevy bond, taken in connection with the antecedent and subsequent condition and steps in the cause. It will be recalled that the attachment was levied upon the machine because of the conception of counsel for plaintiff that a lien existed. We are constrained to assume that Mercer also thought that his machine was subject to a lien and an attachment, and that he executed his replevy bond for the purpose of relieving his property from the charge. It is evident to us that he intended to withdraw his automobile from the burden of the lien and to substitute personal liability. It is recited in his bond that the automobile had been attached by process issued at the instance of Ewing and that it had been levied for the purpose of collecting a sum claimed by Ewing. It was thereupon recited that should Mercer and his surety pay the debt and costs in case he should be cast in the suit, the obligation should be void, but that if he failed to pay the debt, etc., the bond should remain in full force.

This obligation is quite different from the ordinary replevy bond in attachment cases, and yet it is one which is allowable by the statutes. It must be given its peculiar effect of taking the property entirely from the juris-

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diction of the Court or at least discharging the lien of the attachment and substituting personal liability. But one construction can be given such an instrument, and that is that the defendant and the surety obligate themselves unconditionally to pay any judgment which the plaintiff may obtain in the pending suit. This construction has been adopted in this State and it is in accord with the views obtaining in other jurisdictions: *Stephens v. Iron Co.*, 11 Hes., 79; 2 Ruling Case Law, section 106, p. 890. See also 32 L. R. A. (N. S.), 401, and note.

It seems to be somewhat anomalous that any rights can be predicated upon or acquired from void proceedings; but this feature of the question was specially dealt with by our Supreme Court in the *Stephens* case, *supra*, wherein it was held that the giving of such a bond as that signed by Mercer and his surety estopped both principal and surety to assert that there was no valid attachment proceeding. The unmistakable meaning is that if the parties elect to retain their property and litigate the rights involved and agree to abide the result of the litigation, all questions of procedure antedating the attachment are waived.

If right in this position we need not discuss the points urged upon us that the attachment was absolutely void and not amendable. Frankly, we are inclined to the view that the affidavit for the attachment was not good in substance notwithstanding some intimations to the contrary in a few decisions. It is not at all logical, it strikes us, to contend that an attachment can be issued without a sworn statement that some ground therefor existed. But we need not enter at large upon a discussion of this phase of the case. The summons issued in the instant case was made good by an allowable amendment; there were pleadings, warranting a pronouncing of judgment upon the

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issues; the attachment in this case was ancillary, and as the parties had elected to treat the attachment as good or, rather, to substitute personal liability, we do not see that there is any obstacle in the way of pronouncing judgment, and we overrule assignments numbers one, two and three, as well as number four.

In number five it is said there is no evidence to sustain the verdict. The bill of exceptions discloses a case of sharp controversy as to negligence and contributory negligence, of lawful or unlawful conduct. The evidence upon neither aspect was so conclusive as to call for a ruling as a matter of law. Hence, we overrule this assignment of error.

It is urged in number seven that the Court should have granted a new trial upon freshly discovered evidence. We find upon examining the transcript that it does not contain a recital that it embraced all the evidence heard upon the motion for a new trial. Again, the so-called newly discovered evidence was merely cumulative, and we are unable to say that as we should the judgment would have been different had the witnesses been present. We note that Fred M. White, one of the absent witnesses, was a surty upon Mercer's replevy bond. For these reasons and others we do not believe that the Court abused his discretion in declining to grant a rehearing.

Recurring to the validity of the attachment in this case, we wish to repeat that there is some basis for the argument that plaintiff in error treated the attachment as valid while the cause was pending before the Justice of the Peace. It might be urged that this was a waiver of the right to assail the process. If the writ was wholly void, defendant below should not have taken issue thereon. We see no reason for disturbing the judgment, and it is affirmed with costs.

Heggie v. Railroad and Pullman Co.

LUCILE HEGGIE v. A. G. S. RAILROAD AND PULLMAN
COMPANY.

Affirmed by Supreme Court.
(*Knoxville*, 1914.)

1. CARRIER OF PASSENGERS. *Baggage. Retention of control by passenger on Pullman.*

A Pullman passenger who in the day time retains control of a small handgrip containing valuables cannot recover for its loss either from the railroad or the Pullman company without showing negligence or wrong doing of the servants of the one or the other.

2. SAME. *Negligence. When no presumption of from loss.*

In such case no presumption of negligence arises from proof of the fact of loss.

3. SAME. *Degree of care.*

In such case the carrier is responsible for lack of ordinary care only, having the right to rely upon passenger to look out for the safety of his baggage.

4. SAME. *Contributory negligence.*

A passenger who thus retains control of his baggage is guilty of contributory negligence in leaving the train while it is standing at a station and remaining away some time without anyone to guard or look after baggage.

FROM HAMILTON COUNTY.

Appeal in error from the Circuit Court of Hamilton County. NATHAN BACHMAN, Judge.

Heggie v. Railroad and Pullman Co.

MOORE & DARWIN for Plaintiff in Error.

SHEPHERD & FLEMMING for Defendants in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS was a suit by Miss Heggie against the defendant Railroad Company and the Pullman Palace Car Company to recover the value of a handbag and its contents which she claims were lost because of the negligence of the one or the other in November, 1912. The case was tried by the Circuit Judge without the intervention of a jury. He dismissed the action, being of opinion that the plaintiff below, whom we shall call the plaintiff here, had failed to show any negligence upon the part of either defendant. She has brought the case here, and insists by appropriate assignments of error that the Circuit Judge was wrong in denying her a recovery against one of the defendants if not both. We shall take up the question of the liability of the Pullman Company first.

There is very little room for controversy as to what the facts are: On November 5, 1912, Miss Heggie bought a ticket from the defendant railway company in Chattanooga for passage from that city to Dallas, Texas. The line of the railway company extended only a short distance from Chattanooga. It was necessary that she pass on other and distinct lines of railway to reach her destination. At the same time she bought of the Pullman Company a sleeping car ticket for the whole distance. Upon the night upon which she bought the tickets, she entered a sleeper of the Pullman Company attached to a train of cars owned and operated by the defendant railway company, and started on her journey. She was assigned to a particular berth. While not very clear, it appears that

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an aunt and a cousin accompanied her from Chattanooga. Among other baggage which she and her companions had was the handbag or grip in question. It is described as a small affair some sixteen inches long and such as ladies usually carry with them on journeys. This handgrip was carried by Miss Heggie herself into the Pullman. It is not shown where she placed it or what she did with it upon this night of the beginning of the journey. But this is not material. It is evident that upon arrival of the next day, which was the 6th of November, she took charge of this grip and kept it conveniently near her, and that she did not store it in any particular part of the car or train assigned to baggage or put in the custody of any Pullman servant. It contained comb and brush, cosmetics, toilet articles, a kimono and other things which a refined and well provided lady desires to have with her and under her immediate control while on a long journey. She admits that she had had possession of the grip all the morning and that she had occasionally opened it and gone into it for articles and for different purposes, and that when not immediately in use or being gone into it was placed in the aisle close by her seat.

The train on which Miss Heggie and companions were riding reached Monroe, Louisiana, a little after noon on the 6th. They had been playing cards. The aunt of Miss Heggie desired that she mail some postal cards at this particular city. She arose and in company with her cousin went out upon the platform and to the mail car for this purpose. The aunt was left in her accustomed seat. It is not clear that the postal cards were taken out of the grip in question, but it is inferable that immediately preceding their leaving the car for the purpose of mailing the postal cards, Miss Heggie had the grip in her hand and set it down in the aisle near where she had been sitting, and

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where she left her aunt. She admits that she could have placed the grip in the seat opposite her aunt; and it is clear that she could have asked the aunt to take care of it or look out for it while she was away.

The conductor says that he remembers the occurrence well. It was stated by him that, as was his duty and custom, the porter and he went to the platform at the station when the train stopped for the purpose of letting passengers off and on. He remembers having assisted her to get off; that the train stopped about five minutes; that Miss Heggie and her companions occupied the section near the dining car; that he helped her back on the Pullman after she had mailed her cards; that shortly after the train left Monroe she notified him that she had lost her handbag, and he made efforts to locate it, but without success. He further states that she said that a man must have taken her grip off at Monroe through mistake. He testifies that she never said anything about having valuable jewelry in the bag and, further, that he never at any time saw the grip. The testimony of the porter is that the grip was never placed in his care as was other baggage which he helped to carry.

It is earnestly contended by learned counsel for plaintiff in error that she should have been awarded a recovery under the authority of *Railroad v. Katzenberger*, 16 Lea, 380; *Pullman Co. v. Gavin*, 9 Pickle, 93, and *Railroad v. Lillie*, 4 Cates, 331. It is undoubtedly true as a general rule that with respect to baggage, railways are common carriers and as such are insurers of its safety. While Pullman companies are not held to be insurers, they are bound to exercise reasonable care and diligence to preserve and care for the baggage of those who enter their compartments as occupants. See authorities, *supra*. The basis of this rule or the reason thereof is because the passenger in a manner intrusts the custody of the baggage with the carrier

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and has a right to expect that it will be looked after with care and vigilance. If, as a matter of fact, the servants of the carrier, whether a railway or a Pullman company, are not intrusted with baggage, then the reason for the rule does not apply, and it should be held not to obtain.

The present case illustrates the danger of yielding implicitly to a general rule, and further illustrates the oft-repeated assertion of common law jurists, that it is difficult to find all the law written upon any one subject. This case also affords a striking example of the genius of the common law in dealing with the facts of a particular case.

With respect to the Pullman Company, the developments would have justified a recovery if the disappearance had taken place in the night time, or if the young lady had from the first intrusted the servants of the company with this article of baggage. The same result might have followed if she had left it in her berth or at a place which by custom or direction of the servants of the company was allotted for baggage. The Lillie case would under those circumstances have been sufficient authority.

But, as a matter of fact, Miss Heggie reassumed control of this article upon the morning of November 6th, and kept it so closely by her and resorted to it so frequently as to warrant the conclusion that it was exclusively in her possession. In other words, she elected to deprive or relieve the Pullman Company's servants of the custody of this species of baggage and take upon herself the duty or the matter of looking out for it. As a matter of fact, while she had the right during the night time to exact of the Pullman Company's servants a degree of vigilance that might be called little less than high (Garvin case, *supra*), when she, on the morning of the 6th, took the grip into her own hands and kept it by her for constant use, she undoubtedly rendered it impossible for the servants of the

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company to watch for it and care for it. Hence, with respect to this baggage she should be considered as having elected to control it and care for it herself and thus relieve the Pullman Company of the duty of looking after it, and she likewise relieved the railroad of its obligation as insurer. She might well be considered as upon the same plane as that of the occupant of a day coach who elects to take baggage into the car to be occupied by her. At the same time, there is not entire similarity. Notwithstanding this, we are of opinion that when she undertook to care for this property and to keep it by her, the duty of constantly looking after it which might otherwise have rested upon the defendants was cancelled or taken away.

It was stated by Judge Wilkes in the Lillie case that occupants of day coaches who carry their baggage with them cannot charge the railroad company as insurers. We are of the opinion that the same result follows with respect to the occupant of a Pullman Company car when he or she virtually assumes control of small handbags to the exclusion of the servants of the company. When we say that the Pullman Company and the railway company are under such circumstances not to be held as insurers, we mean simply that no presumption of negligence arises from the loss of the baggage, and that the loser would have to adduce evidence warranting the inference of negligence. As a matter of course, both the Pullman Company and the railway company are liable if the loss can be attributed to the negligence or theft of their servants.

In the case at bar there is not any suggestion that there was a lack of vigilance upon the part of the employes of the defendant other than that suggested by the disappearance of the baggage. It was clearly shown that they performed their duties in the customary manner and that the article was not stolen by either one. Its disappearance is

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an unexplained fact from which no inference of negligence can justifiably be drawn. It was held in the case of *Springer v. Pullman Company*, 234 Pa., 172, that a sleeping car company was not required to see that no passenger leaving a car carried any baggage other than his own, and that passengers had no right to insist that the porter or conductor should always be in the aisle or walking up and down the car in such way as to have an eye upon the baggage stored in the car. This rule would not be applicable to a Pullman which had been converted into a chair car and occupied by passengers during the day time; and it certainly could not be insisted that these strict requirements were due a passenger who retained the absolute control of her baggage: *Wicher v. Railroad Company*, 79 Am. St., 314; *Tower v. Railroad*, 42 Am. Dec., 36; *Henderson v. Railroad*, 123 U. S., 61, and *Railroad Co. v. Handley*, 56 Am. Rep., 846, all support the proposition that with respect to passengers on Pullman cars who in the day time keep their baggage with them neither the Pullman Company nor the railway company is an insurer, and that the only duty owing from either, or both, is that of reasonable care. It is likewise deducible from these authorities that the duty of continuous and watchful care exacted of sleeping car companies while berths are occupied by passengers is relaxed and is not to be exacted during the day time, and is especially not owing to a passenger who chooses to keep his baggage by him. See, also, *Carpenter v. Railroad*, 124 N. Y., 58, 11 L. R. A., 759.

We are of opinion that the judgment of the lower Court relieving the Pullman Company of liability was correct, and it is affirmed.

With respect to the judgment against the railroad company, we shall content ourselves with stating briefly our reasons for holding it not liable.

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Granting that the Pullman was one of the railway company's cars and that the Pullman's servants were its servants, we have exactly the case of a passenger in a day coach who chooses to keep his baggage by his side. There is no attempt to show any lack of ordinary care upon the part of the Pullman servants. The rule laid down in the Lillie case is clearly applicable and sufficient authority for the judgment of the lower Court. It is well to repeat what has been intimated hereinbefore, namely, that when a carrier is not in the situation of an insurer, no presumption of negligence arises from the mere showing of a loss. It is incumbent upon the baggage owner to go further and show facts warranting the inference of negligence. *Carpenter v. Railroad, supra.*

We do not discuss the point raised by learned counsel for the railway company that it could not be held liable as a common carrier under the Carmack amendment to the Interstate Laws. There was in 1906 a Congressional enactment, followed later by Interstate Commerce Commission regulations with respect to liability for baggage, particularly the valuation thereof, in which might be found the basis of an argument that with respect to baggage railway companies were to be treated as common carriers and liable as such in all respects as in other cases. But however this may be, we have reached the conclusion that there was no negligence shown by the servants operating the railroad upon which the loss occurred at the time the loss happened. Hence, if the effort were to hold the initial carrier liable for the negligence of a connecting carrier as the agent of the initial railway, the rule would fail here for lack of evidence to show negligence. Plaintiff in error cannot rely upon the presumption of negligence or upon the doctrine or *res ipsa loquitur*, for the reason that this rule applies only to those cases where the defendant has

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the actual custody and control of the goods or the instrumentality, or in other words, as applied to a carrier, only when it is shown that the carrier has taken charge of and asserts control over the lost article.

Again, we are persuaded that Miss Heggie must lose for the reason that the undisputed evidence is that she could have put this baggage virtually into the hands of her aunt or right beneath her eye when she left. While it is unpleasant to think and say it, yet the world is full of thieves, and they are sometimes found arrayed in glory and riding upon the palace cars of this country. Every prudent person knows this, and also knows that they will get in their handiwork notwithstanding the utmost vigilance upon the part of carriers. Hence, ordinary care would suggest to a passenger who has reserved the possession of his or her baggage that he or she not leave it exposed in the day time and in a strange city.

We feel constrained to deny plaintiff a recovery. The judgment of the lower Court is affirmed with costs.

Simmons v. Hart.

E. S. SIMMONS ET AL. V. W. P. HART ET ALS.

Affirmed by the Supreme Court, 1915.

1. CHANCERY JURISDICTION AND PRACTICE. *Form of bill to convert deed into a mortgage. Mental capacity.*

Complainant who seeks to have a deed absolute upon its face declared a mortgage may incorporate therein the averments that the grantor did not have sufficient mental capacity to make a contract, and that the instrument was procured by fraud and undue influence. The rules prohibiting inconsistency are not violated thereby.

2. SAME. *Jury trial in Chancery Court. Submitting issues. Objection to form.*

All objections to the form in which issues are to be submitted to the jury must be made before the final submission thereof to the jury. It is too late after verdict to insist that the issues were contradictory. But the issues as to whether an instrument was a deed or a mortgage and whether the grantor had sufficient capacity to make the contract, and whether fraud or undue influence was used in procuring the instrument, are not inconsistent and may be submitted separately to the jury.

3. INCONSISTENCY IN BILLS. *Multifariousness.*

Inconsistency in averments of a bill in equity is in the nature of multifariousness and must be taken advantage of by demurrer or motion to dismiss.

4. JURY TRIALS IN CHANCERY. *Issues. Mixed questions of law and fact.*

It is allowable to submit to a jury in Chancery a mixed question of law and fact.

5. SAME. *Submission of immaterial issues.*

The fact that immaterial issues were submitted to the jury will not vitiate the verdict if there were submitted and responded to other vital and determinative issues.

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6. SAME. *Determinative issues. What are.*

Any question of fact the finding upon which in connection with all the other issues and parts of the record would enable the Chancellor to decide the whole cause is a determinative one. The parties are not required to submit every issue of fact arising in a case.

7. SAME. *Issues upon bill to convert deed into a mortgage. Right to jury trial.*

Notwithstanding the rule requiring a party seeking to convert a deed into a mortgage to show the facts by clear, cogent and satisfactory evidence, the parties are entitled to a jury trial; and the verdict rendered upon the issues will be weighed as other verdicts in Chancery, provided the Chancellor has given proper instructions as to the quantum of proof.

FROM GILES COUNTY.

Appeal from the Chancery Court of Giles County.
W. S. BEARDEN, Chancellor.

E. E. ESLICK and W. B. SMITHSON for Complainants.
STEWART WILKES for Defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

NOTWITHSTANDING this large record and the extensive briefs filed by able counsel for both sides, we can condense the questions at issue into a reasonable compass. The assignments of error are numerous, but they do not need separate treatment.

This bill was filed by the children and heirs at law of J. M. Simmons against W. P. Hart and his co-defendants for the primary purpose of having declared to be a mort-

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gage a deed executed by Simmons on the 26th day of December, 1896. Hart is the main defendant. The status of the others is dependent upon the result as to him.

It was averred in the original bill that although this instrument upon its face was an absolute deed, it was in fact intended to be and was a mortgage to secure the amount of the consideration. It was also alleged that Simmons did not at the time of its execution have sufficient mental capacity to understand the purport of the instrument; and, further, that he was induced to sign the same because of fraud, imposition and misrepresentation practiced upon him at the time by Hart. The answer of the latter was a specific denial of the three averments of the bill just enumerated.

Complainants demanded a jury, and there were made up under direction of the Chancellor four issues of fact to be hereinafter mentioned. The report of the jury was in favor of complainants upon all the issues. The Chancellor adopted this finding and granted complainants relief to the extent of declaring that the instrument in question was a mortgage, and that they were entitled to the land upon satisfaction of the amount of the indebtedness with interest. Hart has appealed.

The first assignment is that the Court committed error in submitting this cause to the jury at all or upon any issue upon the issues that were submitted. It is said that the issues were not proper, nor material, nor comprehensive, nor put in issue by the pleadings, nor did they go to the whole of the case, nor could the Chancellor pronounce a final decree thereon.

We are of opinion that complainants had a right to go to the jury on the first three issues at least, and that there was no error in formulating and submitting them.

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Assignment No. 2. Under this assignment it is insisted that the Court should not have submitted to the jury the question of the mental capacity of J. M. Simmons. It is earnestly contended that the heirs at law were not seeking a rescission of the contract, and that the question of mental capacity is not appropriate when any other kind of relief is sought. We are of opinion that complainants were seeking partial rescission, or at least a substantial change in the contract; and that when relief of this kind is sought the mental capacity of a contracting party is always pertinent. It is said that this issue was not raised by the pleadings, and that complainants estopped themselves by election of remedies to raise this question. We find that the bill is broad enough to embrace this issue; and the other averments are sufficient to show that complainants denied the efficacy of the instrument as a contract of sale. Hence, their right to complain that Simmons did not understand it, not having sufficient capacity to do so.

In assignment number three complainants insist that the Chancellor was in error in submitting to the jury the question as to whether the deed was procured by fraud or undue means. Learned counsel contend that this was wholly immaterial and also improper for the reason that the inquiry should have been as to the legal effect of this instrument, whether a deed or a mortgage. It is never proper to submit a bare legal question to the jury but it is allowable to submit a mixed question of law and fact. It is urged that this issue was bad because it did not limit the question of undue influence to that exerted by Hart or by others upon Simmons or whether it was exerted upon Simmons or others. The question was not so interpreted upon the trial. Complainants evidently intended to submit to the jury the question of Hart's fraud upon

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Simmons. Responding to the contention that this was not a determinative issue, it suffices to say that it was a material and vital one, such as would have enabled the Chancellor to pronounce a decree in connection with other issues or other parts of the record: Gibson's Suits, Section 534; 16 Cyc., 419.

In assignment number four the Chancellor is criticized for having submitted to the jury the question as to whether the instrument was a deed or a mortgage. Here, again, we must say that this was a vital issue, and determinative, and raised by the pleadings. Evidently the jury understood that they must decide what was in the minds of the parties at the time the instrument was executed. The Chancellor so thought and so stated to the jury. Hence, the criticism that the issue should have been a little more full so as to exclude subsequent intention is not of any moment.

In assignment number five it is insisted that the Chancellor was in error in submitting the question as to whether Hart had ever had possession of the land. We agree with learned counsel that this was not a determinative issue, and that there was no substantial reason why it should have been submitted. But this will not destroy the effect of the verdict upon the other issues. *Bank v. Bank*, 108 Tenn., 274. We decline to treat this as a material error, as defendant Hart was not prejudiced or embarrassed thereby.

In assignment number six it is insisted that the Court was in error in not setting aside the verdict upon all issues. Assignments number seven, eight and nine are in substance the same, and all will be treated together. We shall also discuss assignment number eleven, which raises the question as to the effect of the finding of the jury upon an issue as to whether the instrument was a deed or a mortgage.

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A jury trial in the Chancery Court must be conducted as at common law, and the report of the jury can be disturbed only in accordance with the rules obtaining under that system. Hence, if there is material evidence to support their verdict, approved by the Chancellor, the reviewing Court is not at liberty to set it aside. But it is said that when the issue is as to whether a deed absolute upon its face is a mortgage the quantum of proof is different, and that the question must not be determined by mere preponderance. It is well understood that the proof sufficient to justify this change in an instrument must be clear, cogent, and satisfactory; and ordinarily the Chancellor must determine whether the proof adduced is of that strength. But a complainant seeking such relief is entitled to his jury, and if so, it becomes in the first instance the duty of the jury to determine whether there has been a showing of proofs of the nature the rule requires; and in the second place it devolves upon the Chancellor to approve or disapprove the finding of the jury that the complainant has convinced them beyond doubt that he is entitled to relief. We find that the learned Chancellor properly laid down the rule as to the strength of the proofs, and we must presume that the jury were guided by that instruction when they found complainants the offerers of such evidence as satisfied them that the instrument was intended to be a mortgage. The Chancellor approved their conclusions and we are of opinion that the verdict is entitled to that consideration accorded any other, especially because of the peculiar instructions given to the jury. We therefore feel constrained to hold that complainants satisfied the triers of the facts as to the merits of their claim, and that we have no right to disturb the verdict.

Assignment number ten is based on the refusal of the trial Judge to arrest the judgment because there is no aver-

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ment in the bill that there was a prior or concurrent agreement that the instrument should be a mortgage. This assignment needs no extensive treatment. It has been answered by what has gone before. There is a hint in this assignment and also assignment number eleven that the issues were inconsistent and repugnant, and that they should not have been submitted. This matter of antagonism is adverted to in other parts of the brief. We shall dispose of it by saying that this was a question which should have been raised with respect to the bill by demurrer, and as to the issues, before they were submitted, inconsistency is a matter of multifariousness which is waived by answer and proof. Gibson, Sec. 292. It is also too late after verdict to raise any question as to the form of the issues, provided the issues be material. 16 Cyc., 418.

Affirmed.

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LEWISBURG & NORTHERN RAILWAY CO. v. C. M. CAUSEY
AND WIFE.1. DAMAGES FOR FREIGHT ATTENDED WITH PHYSICAL ILLS. *Abortion.*

There may be a recovery against a wrongdoer for an abortion and other physical ills clearly traceable to mental shock or fright wrongfully caused, although there was no bodily impact.

2. SAME. *Caution.*

While such rights of action must be recognized in a progressive jurisprudence, the Courts must scrutinize the grounds of action closely and require satisfactory proof of the connection between the mental state and the physical disorder.

3. SAME. *Wilful torts. Gross negligence.*

While there is some controversy as to the right of recovery for mental shock occasioned by ordinary negligence, there can be no doubt of the right to maintain an action in such case when the disorder is caused by wilful torts or gross negligence.

4. BLASTING. *Continued in thickly settled community.*

A jury would be warranted in finding parties blasting without proper precautions in a thickly settled neighborhood guilty of grossly negligent conduct.

5. NEGLIGENCE. *Recovery for miscarriage. Ignorance of condition of plaintiff.*

Where the act of the defendant is palpably unlawful and a direct invasion of the premises of a householder, there may be a recovery for an abortion occasioned the wife, although her condition was unknown to the wrongdoer.

6. EVIDENCE. *Opinions as to cause of disorder.*

Physicians and nurses are not allowed to give their opinions that the sickness of the plaintiff was caused by the wrongs of the defendant when there are several antecedents to which the condition might be attributed.

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7. EVIDENCE OF OTHER ABORTIONS AND SUBSEQUENT ABORTIONS.

While it is competent to prove that an abortion or miscarriage renders a woman susceptible to such future mishaps, it is not competent to prove the fact and the sufferings of those subsequent miscarriages. Nor is it competent to prove that other women in the neighborhood of plaintiff themselves suffered abortions because of the method pursued by defendants.

8. EVIDENCE. *Opinions as to negligent methods.*

No witness is allowed to state over objection that the method of doing certain work under investigation was negligent.

9. BLASTING. *Joint liability of all parties participating.*

A railway company, its general contractor and the subcontractor of the latter may all be sued and held jointly liable for blasting carried on in the necessary work of building a railroad.

FROM DAVIDSON COUNTY.

Appeal in error from the First Circuit Court of Davidson County. THOS. E. MATTHEWS, Judge.

P. M. ESTES for Plaintiff in Error.

W. H. WASHINGTON and H. C. PATTERSON for Defendants in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THREE suits under the above style were tried in the Circuit Court of Davidson County together. The first one was that of Mrs. Causey, her husband joining, for damages for a miscarriage and other physical ills which she claimed were caused by the wrongful conduct of the

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plaintiffs in carrying on extensive and long-continued blasting near her home. She recovered verdict for \$2,500. The second suit was that of the husband for the losses sustained by him because of the illness of his wife. He obtained a verdict for \$500. The third suit was for injuries to the house and premises of the Causeys, occasioned by the hurling of stone and earth and by concussion of the air. The verdict in this case was for \$100, in which verdict plaintiffs in error acquiesced.

In the two other cases they sought a new trial, but the Circuit Judge overruled their motions and pronounced judgments. From these judgments they have appealed and have assigned numerous errors. Owing to the unusual character of this litigation, we have given it considerable care and thought, possibly more than the length of opinion would indicate.

The first assignment of error is to the effect that the Court should have held that there was no evidence to sustain the verdict, and the second one is that the Court should not have submitted the issues to the jury. It is apparent that these assignments can be treated conjointly. They are elaborated extensively in the brief of able counsel for appellants, and by learned counsel for defendants in error in their reply brief, and we could consume much space in responding to the various points. But we deem it unnecessary to overload this opinion with extracts from divers decisions and text-books. We shall state briefly our conclusions, with the assertion that we have examined approximately three score decisions bearing upon the interesting questions, and obtained a fairly good conception of the different views entertained.

The theory upon which plaintiffs below proceeded was that the defendants, being a railway company and its subcontractors engaged in railway construction work adjacent

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to their property, were absolutely liable for all damages inflicted upon them by blasting operations, both upon the ground of unescapable responsibility for consequences and because of negligent methods of operation. It was their contention that defendants were likewise responsible for the physical ills, including a miscarriage by Mrs. Causey, occasioned by the continual throwing of earth and stone against the house, keeping her in a constant state of fright and alarm, to such an extent as to destroy her nerves, impair her health and prevent her carrying her child to maturity. It should be observed that the predicate of her suit was physical ills and impaired health consequent upon fright occasioned by the wrongful conduct of the defendants below, and not for fright with physical ills as the consequence. Plaintiffs also proceeded upon the idea that all the defendants were jointly liable.

The first in importance of the contentions made by plaintiffs in error is that this is a suit for fright or mental shock only, and that no such action is known to the laws of this State. A cognate insistence is that no action can be maintained even for physical ills which resulted from mental shock or terror. We have just stated that plaintiffs below had the conception that their ground of complaint was impaired health and physical suffering, although resulting from forces which operated primarily upon the nervous system. This of course would put to one side the contention that this is a suit for mere fright or nerve shock; and hence it becomes our duty to determine whether there is any cognizable legal nexus between the negligent conduct of plaintiffs in error and the mental-physical suffering and condition of Mrs. Causey.

It behooves us first to regard the expressions, intimations and juridical inclinations of our own Courts upon this subject. We can thence proceed to the consideration

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of the question in other jurisdictions, or rather as it is viewed by others. In *Gosset v. Railroad*, 115 Tenn., 378, the Court speaking through Justice Wilkes, virtually gave recognition to actions founded upon mental shock or fright whenever and wherever this shock or fright, negligently or wrongfully occasioned, resulted in physical ills or impairment of health. The jurist was careful to draw the distinction between suits for terror and alarm which leave no physical trace, and those mind conditions which eventuate in destroyed nerves and impaired health. And this, although not elaborated in the opinion is in our judgment sound to the core, and could at that time have been fortified by the observations of some of the profoundest thinkers in the world of jurisprudence. This question was presented to us some three years ago at Knoxville in the case of *Railway v. Deakins*, 3 Tenn. C. C. A., 28, and was given some thought and investigation. We reached the conclusion then that the law did not recognize and would not in its then stage of development countenance in simple negligence cases a right of action for shock or fright leaving no visible or ascertainable effect upon the system; but that when the consequence of the mental disturbance is to destroy the health of a plaintiff, a right of recovery should not be denied, notwithstanding there was at the time no physical impact nor perceptible physical injury.

The investigation which we have given this subject, necessitated by the questions arising in this case, have confirmed us in our view that the intimations in the *Gosset* case and the expressions in the *Deakins* case were well based, and that there is no reason for denying a recovery when the conditions which call for reparation are satisfactorily shown in the proof. We asserted arguendo in the *Deakins* case that a miscarriage occasioned by mental shock always afforded a right of action, being of the opin-

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ion that this was a physical ill which none could gainsay. And we are still of the opinion that whenever the connection between the fright and the miscarriage is shown, the right to damages is clear, regardless of the views that may be taken of the question as to whether suits for mental shock should be entertained. We are aware that the Courts of Pennsylvania, New York, Massachusetts and possibly Arkansas at an early day took a contrary view, and that they have been reasonably consistent in so holding. But we have no hesitancy in agreeing with the strictures upon the positions of those Courts uttered by the learned annotator of the case of *Huston v. Freemansburg*, 3 L. R. A. (N. S.), 1. The review of the cases to be found in the note just referred to can leave no doubt in the minds of those who are keeping pace with the advancement of juridical thought and with the effort to make the common law the perfection of reasoning as commanded by Lord Coke. Such actions should be given unqualified recognition whenever Courts are convinced of the union between the assumed cause and the consequence. We are persuaded that every objection raised is met by the arguments thus found, and that any serious opposition must be the result of overmuch conservatism. We shall not undertake to arrange in order nor to comment at length upon the various authorities consulted by us as confirmations of the opinions which have been heretofore intimated or expressed. We have examined with profit, in addition to the case of *Huston v. Freesmansburg*, the following adjudications; *Langhorn v. Turner*, 34 L. R. A. (N. S.), 211; *Green v. Shumaker*, 23 L. R. A. (N. S.), 667; *Conley v. Drug Co.*, 55 L. R. A. (N. S.), 830, and note; *Solini v. Railroad*, 55 L. R. A. (N. S.), 834; *Spearman v. McCleary*, 4 Ala. Appls., 473, 177 Ala., 673; *Pankopf v. Hinkley*, 24 L. R. A. (N. S.), 1157; *Railroad v. Robinett* and note, 45 L. R.

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A. (N. S.), 433; *Simone v. Railroad, Rhode Island*, (9 L. R. A. (N. S.)), 740; *Stewart v. Railroad*, 112 La., 764; *Railroad v. Hayter*, 93 Texas, 47, 47 L. R. A., 325; *Per-cell v. Railroad*, 48 Minn., 134, 16 L. R. A., 203; *Kimberly v. Howland*, 7 L. R. A. (N. S.), 545; *Hunter v. Railroad*, 29 L. R. A. (N. S.), 851; *Ingle v. Simmons*, 7 L. R. A. (N. S.), 96; *Pullman Company v. Lutz*, 14 L. R. A. (N. S.), 907; *Tunncliff v. Railroad*, 32 L. R. A., 143; *Sloan v. Railway*, 32 L. R. A., 193, 44 Pac., 320; *Salmi v. Railway Co.*, 146 Pac., 819; Note to *Railway v. Canfield*, 11 C. C. A., 556, 561; see also 1 Street on Liability, 458; Watson on Damages, Sec. 402; 1 Sutherland on Damages, Sec. 23; 1 Thompson on Negligence, Sec. 156; see also an English case of *Duliu v. White & Son*, 2 Qb., 682, also the Irish case of *Bell v. Railroad*, 26 Common Law, both of which cases virtually repudiate the earlier English case of *Railway v. Coltus*, 13 App. Case, 222. So that we not only have the great weight of authority in this country, but the preponderating authority of the English Judges, whose opinions as to what the common law is or ought to be are too often neglected. A vast number of other cases and observations of text writers could be referred to, but we think it wholly unnecessary.

We carefully examined all the typical cases taking the contrary view that were brought to our attention by the learning and industry of counsel representing the appellants, but found nothing therein that would constrain us to a contrary view. At the same time the restraining and cautionary observations of those Courts must not be neglected in the recognition of this class of actions, for we can see that abuse and injustice may result. But we are persuaded that this fear of a deluge of lawsuits is not very well grounded. An examination of the judicial output of the dozen or more States which have fully recognized this

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species of action fails to show that the Courts have been overwhelmed with lawsuits of this nature. But at the same time it must not be forgotten that this species of litigation must be carefully guarded, and that recoveries must be denied except in those cases where there is no reasonable ground for disbelieving the union between cause and effect. The difficulty of disproving the consequences of fright has been the cause of the opposition to this kind of litigation, and this apprehension must still be kept in mind by the Courts to the end that injustice be not done. The safer and sounder rule is to require that there be undoubted, visible, ascertainable, physical conditions occasioned by mental shock. And when this is not reasonably apparent, recovery should be denied. But when the physical ills are undoubtedly attributable to a defendant's wrongful conduct, it is rank injustice to refuse indemnity simply because a mental state is one of the phases.

Recurring to the point at issue, we are unable to say that the continual blasting by plaintiffs in error did not cause the impairment of Mrs. Causey's nerves and the producing of the abortion of which she complains; and for this reason, being persuaded that she may maintain an action of this kind, we must overrule the first two assignments of error. But at the same time there is room for controversy as to cause and effect, and for this reason we are constrained to sustain certain other assignments of error which will be subsequently treated.

A few observations in addition to those above are suggested by the contention that the Court should treat this as a mere action of negligence, and should follow the general rule denying recoveries for mental shock in such cases. We are inclined to the view that actions for damages brought for injuries occasioned by long continued blasting are for more than negligence, especially where there

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have been protests and entire omission to take precautions to prevent the hurling of missiles against habitations. We find testimony of this tendency in the present record. These aspects in connection with the inherent nature of blasting in thickly populated sections, suggest the ideas of gross negligence, trespass, nuisance and wilful tort. In all such cases, that is, of trespass and gross negligence, there may be a recovery for mental shock, and the Courts are not so particular in requiring the leaving of undoubted physical traces. *Langhorn v. Turner*, 34 L. R. A. (N. S.), 211; *Solini v. Railroad*, 55 L. R. A. (N. S.), 834; *Mitchell v. Railroad*, 151 N. Y., 107; *Haile v. Railroad*, 9 C. C. A., 134; *Kimberly v. Howling*, 7 L. R. A. (N. S.), 545; *Hunter v. Railroad*, 29 L. R. A. (N. S.), 851; *Blackwell v. Moore*, 17 L. R. A., 729; *Carey v. Morrison*, 65 L. R. A., 660; 19 Cyc., 7; *Smith v. Telegraph Co.*, 47 L. R. A., 343; *Watkins v. Kolin*, 60 L. R. A., 617; *Telegraph Company v. Stoneking*, 1 Tenn. C. C. A., 241.

It is urged by counsel for appellants that his parties should not at least be held responsible for the abortion of Mrs. Causey, upon the ground that they had no knowledge of her condition and that to ascribe this consequence to their action would be violating the law of negligence as to foreseeable results. There is some plausibility in this argument, and it may be controlling in some circumstances. But we deny that it suffices to repel Mrs. Causey. As before intimated, there is testimony tending to show that plaintiffs in error persisted in their course after becoming aware that it might result in harm. That of itself would be sufficient to charge them with all the direct and indirect consequences of their acts, whether known to them or not. The requirements of the law are met when the presence of a young or middle aged woman living with her husband is brought to their attention. It is not then unreasonable

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to charge defendant with notice that methods of work pursued in a negligent or aggravating manner might result in injury to the woman and might eventuate in a miscarriage. *Railroad v. Roberts*, 45 L. R. A. (N. S.), 437, and note, and see, also, principal case. See likewise *Dunlap v. Waggoner*, 44 Amer. Rep., 54; *Sloan v. Railroad*, 32 L. R. A., 197, and see the celebrated case of *Scott v. Shepherd*, 2 Wm. Blackstone, 892.

With respect to the contention that the blasting was carried on with the utmost care, it suffices to say that some liability would result regardless of the utmost care; and, besides, in the present case there is some evidence to the effect that the blasting was carried on without any precautions.

In the third assignment it is stated that the Court permitted one Mrs. Walsh, a professional nurse of considerable experience, to state to the jury that in her opinion the nervousness of Mrs. Causey was occasioned by the blasting done by the defendants below. In the fourth assignment of error it is insisted that the Court wrongfully permitted Dr. C. A. Black, Mrs. Causey's attending physician, also to state that Mrs. Causey's nervousness was occasioned by the blasting and that her abortion was produced thereby; and, further, that the conduct of the defendants below had created in Mrs. Causey a predisposition to abort or to miscarry. Part of the testimony of Dr. Black criticized was in the form of a hypothetical question, and it is earnestly contended that for this reason the rule prohibiting the expression of an opinion by experts does not apply.

The objection to this line of evidence was to the effect that it was the calling forth of an opinion or rather a statement that the very acts which are the predicate of these suits caused the consequences of which the plaintiffs

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below complained, and being such is incompetent because of an invasion of the province of the jury. After carefully pondering these questions we have reached the conclusion that they were not competent under the rules now obtaining in this State, and that all the assignments of error of this kind must be sustained.

We have given due consideration to the reasons advanced by able counsel for appellants for the admission *ex rei necessitate* of such evidence, but are persuaded that that line of inquiry is not permissible in this State, whatever may be the views obtaining in other jurisdictions. In the early case of *Gibson v. Gibson*, 9 Yerger, 329, it was decided that it was improper to ask a witness a question which called for an answer upon any issues of law or fact which was directly involved in the controversy. The same ruling was made in the subsequent case of *Bruce v. Beall*, 99 Tenn., and was followed by the case of *Peacher Mills v. Telegraph Co.*, 2 Thompson, 374. This last case, judging from the authorities that Justice Williams referred to, places Tennessee against the admission of such evidence, even in the most intricate medical questions. Our Court had in an earlier case of *Railway v. Hicks*, 1 Tenn. C. C. A., 561, speaking through Justice Hall, held that a physician could not be asked whether the bad conduct of a defendant had caused the physical conditions from which the plaintiff was suffering. In the *Peacher Mills* case, this Court, following some views expressed by Prof. Wigmore, said that where the cause of a certain effect was not to be seriously disputed, an expert might state that the effect was produced by the assigned cause, leaving the jural consequences to be determined by the Court and the jury. But our views did not meet with the approval of the Supreme Court even in that case, where there was not much dispute to the effect that the lightning did proceed along

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the telegraph wire and produce a fire. And we, of course, must yield to the superior position and reasoning of that Court. We find in the case of *Castano v. Railway Co.*, 53 L. R. A. (N. S.), 1057, a very interesting review and annotation of the adjudications. While a majority are to the effect that a physician may testify that in his opinion the assigned cause produced the disease of which the plaintiff complains, there are reasons given by the minority for excluding such testimony upon the ground that it invades the province of the jury. Such is the view expressed by Mr. Chamberlayne in his work on Evidence, Vol. 3, Sec. 223-4-5. It should also be noted that our own Supreme Court held, but without discussion, that physicians might give their opinions as to whether certain sewer gases produced sickness in the family of the plaintiff; *Knoxville v. Classing*, 111 Tenn., 134. But this case has not subsequently been cited as authority for the position, and cannot probably consist with the Peacher Mills decision. But it must be observed that the Peacher Mills case is in line with the preponderant authority noted in 53d L. R. A., 1057. We are inclined to the opinion that no hard and fast rule now obtains in Tennessee, but that for the present it is established that where there are several probable causes of a disease or death, the plaintiff cannot ask for the opinion of physicians upon the assigned cause.

We feel, therefore, constrained to sustain assignments number three and four and we are also of opinion that assignment number five for like reason be sustained.

In assignments numbers six and seven it is said that the Court erroneously allowed witnesses to testify that one Mrs. Norman, a neighbor to Mrs. Causey, also suffered an abortion during the time plaintiffs in error were blasting. This was admitted by the learned trial Judge upon the doctrine of similarity of causes and situations. We do

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not agree with the view thus taken. We are of opinion that there are so many unascertainable reasons or causes of miscarriages that the principle of analogy is of no value for evidential purposes here. We sustain these two assignments of error.

In assignments eight, nine and ten, it is insisted that the Court was in error in allowing Mrs. Causey and the physicians to testify that she suffered a second abortion in April, 1914. We are of the opinion that this is the carrying of consequences of a wrongful act entirely too far, even as against a manifest tortfeasor. If a second abortion with its attending circumstances may be proven, for like reason a third or a fourth or a fifth one may be shown. Hence, we think this testimony as to particulars clearly irrelevant and manifestly prejudicial. It is undoubtedly true, as stated by physicians, that one miscarriage begets a predisposition to a repetition, and this fact was and is competent in this controversy; but we know of no reason for ascribing all the ills of subsequent abortions to the original wrongdoer in the absence of an indubitable showing that the first cause produced the secondary effects. We sustain these assignments of error.

Assignment number ten is well taken, but it could not alone be made the basis of a reversal. Defendants below were liable for something, whether they blasted properly or improperly, but it was competent, in order to make clear the right of action for damages for fright, to prove that they were unmistakably careless in their methods of operation. But this concession did not establish the right to prove out of the mouth of the witness that the manner pursued was negligent. That was a question for the jury.

We do not think assignment number twelve is well taken. There was evidence tending to show that all the defendants were connected either as the original ocmanpy or sub-

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contractor with the work of blasting. In such case all may be held. *Gossett v. Railroad, supra*; *Telephone Co. v. Stoneking, supra*.

We do not deem it necessary to elaborate on any other assignments of error. For the reasons indicated, we feel constrained to reverse and remand for a new trial as to both cases. Defendants in error will be taxed with the costs of this Court.

ADVANCE THRESHER COMPANY V. A. J. HANLEY.

Writ of certiorari denied by Supreme Court, 1914.

1. SALES. *Principal and agent. Uncommunicated order.*

A non-resident principal cannot be held liable as upon breach of a contract when the alleged contract consisted of an order delivered to a local agent to be delivered to the principal for acceptance or rejection, which order was never transmitted by the agent.

2. SAME. *Liability of agent.*

But in such case, the agent might sustain such relation toward the purchaser as to be himself liable.

FROM DAVIDSON COUNTY.

Appeal in error from the Second Circuit Court of Davidson County. M. H. MEEKS, Judge.

Thresher Company v. Hanley.

H. S. STOKES for Plaintiff in Error.

JAS. T. MILLER for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

HANLEY brought this suit against the Thresher Company for the purpose, as disclosed in his Justice's warrant, of recovering damages for an alleged breach of contract in the sale of a second-hand threshing machine. It was taken to the Circuit Court of Davidson County and there tried before the Judge and a jury. A verdict of \$150 damages in favor of Hanley was returned. The Circuit Judge refused to set this verdict aside and pronounced judgment thereon. From this judgment the Thresher Company has appealed and assigned numerous errors, to be more exact, twenty-two in number. Several of these assignments of error are well based, but in the view that we take of this case it is unnecessary to notice any others than Nos. 12, 13 and 14.

The plaintiff in error is a foreign corporation dealing in threshing machines and other farming implements, having its principal office at Battle Creek, Michigan. During the year 1909 it had a local agency in Nashville. In April or May, of 1909, Hanley went to this local agent and signed an application or order for the purchase of a second-hand threshing machine at the sum of \$400, to be paid for in installments. There was on hand in the machinery yard of the company at Nashville the second-hand thresher that Hanley desired to buy. Hanley lived in Wilson County. In a few days after he made what the trial Judge designated as an application or order, he returned or sent to the agent at Nashville a request to know the status of his offer, or, as he contends, to obtain the machine. Between the date

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of his signing the application and this date of inquiry, the local agency disposed of this second-hand thresher to another person at the price of \$500. Soon thereafter this suit was brought.

It was the contention of learned counsel for Hanley in the lower Court that the local agent in Nashville was more than a mere solicitor, and that he had the authority to, and did, enter into a contract to sell the thresher in question to him, and that subsequently and before the day upon which delivery was to be made, he breached this agreement by selling the thresher to another party.

The contention of the Thresher Company was and is that the proposition submitted by Hanley was simply an order or offer to be transmitted by the local agent to the chief office in Michigan for acceptance or rejection, and that no contractual relation whatever was assumed until this was done. It is his further insistence that whatever may have been the powers of the local agent, he in this instance took the offer or order of Hanley under consideration and investigation with the intention, ultimately, of submitting it to the home office, and that until this was done, there was not and could not arise any privity of contract between the company and Hanley. With these respective contentions before him, His Honor proceeded to tell the jury in effect that the application of Hanley was an order or application, and instructed them that notwithstanding this may have been an order or application, the fact that it was not transmitted to the home office for acceptance or rejection would not affect his rights. He further charged the jury that (notwithstanding the signing of the application or order) if the Thresher Company failed and refused to carry out its contract and deliver the machinery to plaintiff, there could be a recovery. His Honor further instructed the jury that the law would not

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permit the defendant to take an order for machinery and then before the day of delivery sell it to another because a greater price could be obtained, upon the pretense or claim that the property statement made by the proposed purchaser at the time of the sale was not satisfactory.

What we have just referred to as in the charge of His Honor is in substance the basis of assignments of error Nos. 12, 13 and 14.

One part of the instruction, particularly that referred to in assignment No. 13, is erroneous as assuming that there was a contract between the parties. This was a vital issue in the case. But passing to more material considerations, we are constrained to take the view that the learned Judge was in error in his statement as to the legal rights and duties growing out of the relations between the parties. It would be quite revolutionary to hold a non-resident bound by a contract into which he never entered, either in person or by agent. We have taken the pains to consult a number of authorities upon this question. They are in unison to the effect that the mere submitting of an order or application for the purchase of property, the order to be transmitted to the office of the non-resident principal, for acceptance or rejection, is not in any sense an entering into a contractual relation. It can amount to no more than a mere offer, to be transmitted through the receiving agent to the principal, and until received by the principal and considered and accepted, no rights are acquired by the offerer and no contractual obligations assumed by the principal: 35 Cyc. , 550-551; *Sumner v. Stewart*, 69 Pa. St., 321; *Johnson v. Fairmount Mills*, 163 Fed., 567; *McKinley v. Dunham*, 42 Am. Rep., 740; *Buggy Company v. Heth Spring & Axle Company*, 4 L. R. A. (N. S.), 431; *Bauman v. McManus*, 10 L. R. A. (N. S.), 1138; 19 Cyc., 293.

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But it is urged that the plaintiff in error should be held liable because the local agent did not transmit the offer or order submitted by Hanley. It was known to Hanley that the party with whom he dealt in Nashville was an agent. It must also be assumed that Hanley knew, when he signed the application for the purchase from the company of the thresher in question, that he had reference to the property of an absent principal, and that one thing at least had to be done before there could be any privity between that principal and himself, namely, the transmission of that order for acceptance or rejection. We are not aware of any principle upon which we can hold the Thresher Company liable on a contract of which it had never heard, if it be true, as conceded, that Hanley's order was never transmitted.

We are now treating of that phase of the case presented by the instructions of His Honor, and we must not be understood as holding that the local agent did not have authority to represent the company and could not have entered into a contract of sale. We simply decide that the trial Judge took an erroneous view of the legal effect of the evidence presented by plaintiff in error. The conclusion is inevitable that if Hanley's case rests alone upon the failure of the local agent to transmit the order for acceptance or rejection, there can be no recovery and the case had as well end. But there is evidence tending to support Hanley's contention that he bought the machine outright, and this testimony is sufficient to prevent a judgment of dismissal here.

Recurring to the legal proposition arising, it cannot be insisted that the Thresher Company is liable for acts, neglect or omission of its local agent. This is the general rule, but this rule has no application to the case of a proposing

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purchaser who is submitting an order to be subsequently passed upon by the principal.

It strikes us that if Hanley has any right of action at all for the failure to transmit his application (pretermittting his contention that he made an absolute contract of sale), it would be against the agent alone. While ordinarily an agent is responsible to the principal alone for misfeasance or nonfeasance, cases may arise in which the third person or persons may sue the agent for breach of duty which may be owing primarily to his principal. For instance, the agent may have assumed such a relation or duty with or toward that third person as to obligate himself to do for that third person a certain act. In this case it seems to us that any breach of contract or duty upon which Handley can predicate any right of action is purely a personal one of the local agent, laying aside for the present his supposed right of action for breach of an absolute contract of sale: *Drake v. Hagan*, 24 Pickle, 265; 19 Cyc., 305. It probably was the duty of this agent, if Hanley's financial standing was satisfactory or reasonably so, to have transmitted the order to the home office. But for this failure Hanley acquired no right as against the company. For the reasons indicated, the judgment of the lower Court is reversed and the cause remanded for a new trial. Appellee will pay the costs of this Court.

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L. M. HOWELL v. CONSOLIDATED CASUALTY CO. ET ALS.

Writ of certiorari denied by Supreme Court, 1916.

1. CORPORATIONS. *Liability for malicious prosecution growing out of criminal prosecution instituted by agent. Scope of authority.*

A corporation may be held liable in damages for a criminal prosecution instituted by an agent when commanded so to do by the authorized representatives of the corporation or where the institution of criminal suits is within the real or apparent scope of the agent's authority.

2. SAME. *Insurance company. Liability for prosecution instituted by local agent of his own volition.*

An insurance company is not liable in damages for a criminal prosecution instituted by an agent whose employment consisted of making contracts of insurance, appointing sub-agents and collecting therefrom and from policy holders and transmitting funds to the home office. Especially is this authority lacking in a case where the agent instituted prosecution for embezzlement against the sub-agent who was accountable to the general agent alone and not to the company.

3. PRINCIPAL AND AGENT. *Apparent scope of authority when a question for Court or for the jury.*

As a general rule the question as to whether a certain act is within the apparent scope of an agent's authority is one of fact for the jury. But when the act is clearly a departure from the employment of the agent or wholly foreign to the business of the master, the Court may determine the matter as a question of law.

4. WHEN MASTER LIABLE.

In order to hold a master liable for an act of his agent, the act must appertain in some degree to the business for which

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he was employed. If the agent was engaged about a matter of his own or if there was a total departure from the business of the master, the latter cannot be held liable.

FROM SHELBY COUNTY.

Appeal in error from the Circuit Court of Shelby County, Part III. T. B. PITMAN, Judge.

EDGINGTON & EDGINGTON for Insurance Co.

ANDERSON & CRABTREE for Howell.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS is an action for malicious prosecution instituted in the Circuit Court of Shelby County and prosecuted to a final hearing, when the jury returned a verdict in favor of plaintiff against both defendants for \$1,000.00. On defendant's motion for a new trial the verdict was set aside as to the Casualty Company and the suit against it dismissed on the ground that its agent, the defendant Lawrence, was not shown to have had any authority, express or implied, to prosecute plaintiff upon a charge of embezzlement of the funds of the company. The motion for a new trial by the defendant Lawrence was overruled, and judgment was entered against him in plaintiff's favor for the amount of the verdict. When the trial Judgeset aside the verdict and dismissed the suit against the company, plaintiff thereupon appealed to this Court and seeks a reversal of the judgment and assigns as error his action in setting aside the verdict and dismissing the cause as to the Casualty Company. While the defendant Lawrence prayed and was granted an appeal he did not perfect it and, con-

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sequently, the judgment as to him remains in full force in the lower Court. The plaintiff was granted an appeal on the pauper oath, which he filed, and when it was filed his appeal was granted.

The main error, and in fact the only error insisted upon in this Court by learned counsel for appellant, is the action of the trial Judge in sustaining the company's motion for a new trial and the dismissal, as on peremptory instructions, of plaintiff's suit against it. The grounds upon which the trial Judge sustained the company's motion is best stated in his own language:

"The warrant and indictment against plaintiff as sworn out and prosecuted by the defendant Lawrence alleged that the money embezzled was the property of the said Lawrence and Aiken, his partner, in the warrant and of Lawrence in the indictment, and does not charge that it was the property of the defendant, the Casualty Company. J. S. Sherer, President of the defendant Casualty Company, testified that he had no connection with and gave no authority to Lawrence for setting on foot the prosecution, and that he did not even know of it until the case at bar had been commenced. All the evidence upon the subject in the case bears out this view. The Court therefore, under its undoubted discretion, not only sets aside the judgment against the defendant Casualty Company and wholly unauthorized, but grants a judgment in the nature of a peremptory instruction in favor of the said defendant, the said Casualty Company, upon the merits of the case as heard upon the trial."

In passing upon the assignments of error filed by appellee in this case it becomes necessary that we state somewhat in detail the facts as developed on the trial in the Court below. It appears that the Consolidated Casualty Company is an insurance company, insuring against sick-

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ness and accident, and was incorporated and organized under the laws of West Virginia, with its head office at Louisville, Kentucky. It had appointed sometime prior to the 18th of June, 1913, the defendant Lawrence and one Aiken as its general agents for Memphis and the territory adjacent thereto. They kept their office in the city of Memphis in this State and acted as such general agents for the Casualty Company under the firm name of Aiken & Lawrence for some time after their appointment, when Aiken died, and some time thereafter Lawrence married his widow. After the death of Aiken Mr. Lawrence continued to act as the general agent of the Casualty Company, retaining the firm name of Aiken & Lawrence.

The declaration avers that the policies written by this insurance company are usually what are commonly known as industrial policies, and are issued mostly to the colored population in and around Memphis, but whether altogether to them the record is silent. It appears that on the 7th of March, 1913, the Insurance Commissioner of the State of Tennessee issued to the plaintiff, L. M. Howell, of Memphis, a license to act as agent for the Casualty Company, and in it it is stated that he "has authority to take risks and transact the business of accident health insurance for and in behalf of said corporation in said State so far as he may be legally empowered, from January 1, 1913, to December 31, 1913." Plaintiff Howell was the authorized and legally appointed agent of the defendant company to take risks and transact the business of accident and health insurance for and in behalf of the defendant company in the State of Tennessee. The general agents, Aiken & Lawrence, selected Mr. Howell and agreed upon terms with him to act as agent and transact business for the defendant company in Tennessee. He was authorized to take applications for policies of insurance in this com-

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pany and to deliver to the insured policies when properly signed by the officers of the company and to collect from them the premiums due thereon. These premiums were collected once a month, and it was the duty of Mr. Howell to settle once a month with the general agents for all premiums collected by him during the preceding month, and when such settlement was made to pay to the general agents all of the premiums collected by him after deducting his commissions allowed him for securing the policies. The business he transacted for the company was confined altogether, as we believe, to the colored population of Memphis, and the amounts collected by him as premiums from each policyholder during each month was small, not amounting to over \$2.00 in any one case.

It appears that on the night of the 18th of June, Mr. Howell, while going home about ten or eleven o'clock, was robbed of \$36.90 of premiums that he had collected for the company, by two negro men. He states in his testimony that after the robbery he at once reported the fact to the police department of Memphis and gave the officers in charge of police headquarters a description of the two negro men who had robbed him. After doing so he went to his brother's home and remained all night, and the next morning went to the general agent's office to report the fact to Mr. Lawrence, who was then the only general agent representing the company, and under whom he was working. Mr. Lawrence was not in the office when he reached it, and, remaining there for an hour or two awaiting his return, and Mr. Lawrence not coming in, he then went to work for the company and continued during that day. The next morning, which was Friday morning, he again went to the office of the general agent, which was in the Southern Express Building, and reported to Mr. Lawrence the robbery, telling him he supposed he had seen it pub-

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lished in the Commercial Appeal. Lawrence said: "You turn in the list of the people you collected from," when Howell then went out and worked for the company that day and wrote another application and policy and the next morning carried to Mr. Lawrence a list of the people from whom he had collected money which had been stolen from him by the robbers. Lawrence was not in the office at that time. It was not long before he came in, when he said to Howell, "You must make the money good to the company, and you will have to do so by twelve o'clock today, or I will have you arrested." To this remark Howell replied, "Alright, if you are determined to do that. I can't make it good. I won't have any chance to make it good," and Lawrence again said, "Well I am going to do it," and asked Howell to come back in about twenty minutes, saying he was going to talk to his lawyer, and for him to come back. That was the 21st of June, 1913. The next morning Lawrence went to the magistrate's office and found that a warrant had been issued for him, but the Justice told him that he could go at will and return when the deputy sheriff was present. The next day Howell returned to the office of the magistrate and met the deputy sheriff and entered a plea of not guilty, and was then committed to the jail of Shelby County, being placed therein about ten o'clock A.M., and remaining in jail until about four or five o'clock P.M. of the same day. On the same day, that is the 21st of June, 1913, an indictment was presented to the grand jury with W. H. Lawrence's name signed as prosecutor thereto, charging plaintiff Howell with embezzlement of "\$36.90 good and lawful money of the United States, . . . all of the value of \$36.90, the proper goods and chattels of W. H. Lawrence." The grand jury failed to find a true bill against plaintiff upon the charge of embezzlement as contained in the indictment,

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when he was released from jail about four or five o'clock that afternoon, and soon thereafter instituted this action against Lawrence and the defendant Casualty Company for malicious prosecution, and the question now for our judicial determination is whether this suit can be maintained against the Insurance Company as well as against its general agent, Mr. Lawrence.

The affidavits that Mr. Lawrence made averred that the money embezzled was the property of Aiken & Lawrence, agents. The indictment charges that the money was the proper goods and chattels of W. H. Lawrence. Neither the affidavit nor the indictment alleges that the money charged to have been embezzled was the property of the defendant, the Consolidated Casualty Company. Mr. Lawrence in his testimony says that he was bound for this money to the Casualty Company, and that whether Mr. Howell paid it to him or not the company looked to him for it, and he was bound to pay it to them. Liability against the company is sought to be fixed upon it because, as it is insisted, Lawrence was acting for the company in starting this criminal prosecution; that he had implied authority from it to begin such a prosecution and having such authority and having instituted the prosecution as the agent of the company it is bound by his acts and liable to the plaintiff for the wrongful and malicious prosecution upon the charge of embezzlement, and that is the question for our determination.

It has long been well settled that, where an agent is authorized by a corporation, which he represents and for which he is acting, to institute a criminal prosecution against an individual, it is liable for an action for malicious prosecution if such criminal proceeding turns out to have been wrongfully and maliciously and without probable cause instituted and prosecuted. The liability of the

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corporation in such case to be sued for malicious prosecution, and the right of the plaintiff to a recovery in such an action depends upon whether the agent, at the time he instituted the prosecution, was authorized by the company to begin the criminal proceeding against the party charged therein with a crime. If the agent had no such authority, either express or implied, then the corporation is not liable to the party prosecuted in an action for malicious prosecution. It is not necessary that the agent's authority from the corporation be given to him in express terms. His authority to begin the prosecution may be implied from the nature and character of the business he is appointed to transact for the corporation.

It is said that in most cases it is a question for the jury to determine whether the act done by the servant or agent is within the scope, or apparent scope, of his authority: 19 L. R. A., 825; 14 L. R. A., note at bottom of p. 795; 27 L. R. A., 161; 70 L. R. A., 741; 4 Hig., 211. It is not, however, always a question for the jury to determine; but where the facts are undisputed it then becomes a matter of law for the judgment of the trial Court, and when the act done by the agent of a corporation is clearly foreign to the scope of his employment the question then of his authority is one of law for the Court to settle: 19 L. R. A., 825. It is said what are the limitations of an agent, or of a servant's authority, depends generally upon the things he is doing, the object he is set to accomplish, the degree of discretion which the position where he is placed and the exigencies of the occasion reasonably call for: 19 L. R. A., 825. The act for which the master is liable must be something incidental to the employment for which the servant is hired and which it is his duty to perform. To render the master liable the act must pertain to the particular duties of the employed. The master cannot be made

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liable for acts which a servant volunteers to do for him beyond the scope of his employment.

It was stated by Mr. Justice Walker in the case of *Jackson v. Telegraph Co.*, decided by the Supreme Court of North Carolina, 139 N. C., 347, and reported in 70 L. R. A. (O. S.), 740: "A servant is acting in the scope of his employment when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the scope of his employment if he is engaged in some pursuit of his own. Every deviation from the strict execution of his duty is not such an interruption of the course of employment as to suspend the master's responsibility; but, if there is a total departure from the course of the master's business, the master is no longer answerable for the servant's conduct." The same learned Judge, in the case of *Daniel v. Railroad Co.*, 136 N. C., 317, reported in 67 L. R. A. (O. S.), 455, said, in speaking of the master's liability for the acts of his agent in bringing a criminal prosecution, where the agent of a railroad company had a party arrested upon the charge of stealing money of the company out of one of its drawers in its depot: "If we should hold that the doctrine of respondeat superior is so broad in its scope as to include a case like this, it would lead to most dangerous consequences. For us to say that an agent can, by his acts, subject his principal to liability in damages to any one injured by his said act, done when he was not about his master's business and had no express or implied authority to do them, but was merely seeking to avenge a supposed wrong already committed or to vindicate public justice, would be carrying this doctrine far beyond its acknowledged limits."

In *Railroad Co. v. Brewer*, decided by the Court of Appeals of Maryland, in 1894, and reported in 27 L. R.

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A. (O. S.), that Court said, when speaking about the authority of an agent to institute a criminal proceeding so as to make a corporation liable for malicious prosecution: "In consequence, however, of the fact that a corporation must of necessity act through its agents, Courts have almost invariably held that to hold a corporation liable for tortious acts committed by its agents, the act must be done by its express precedent authority or ratified and adopted by the corporation. Nor is a corporation responsible for unauthorized and unlawful acts, even of its officers, though done *colore officii*. To fix the liability it must either appear that the officers were expressly authorized to do the act, or that it was done *bona fide*, in pursuance of general authority in relation to the subject of it, or that the act was adopted or ratified by the corporation." We are not prepared to altogether endorse this statement of the rule of liability of corporations for the acts of its agents. We think there are many cases where it would be liable for the acts of its agents when done within the apparent scope of their authority. The authority to do the act need not always be given in express terms. It is sometimes implied from the nature of the business the agent is appointed to transact for the corporation.

In 31 Cyc., 1405, in speaking of the authority of an agent to act for his principal, it is said that: "Every grant of authority should, if possible, be so construed as to give effect to the intent of the principal in creating the agency, is the cardinal rule of construction of the authority of an agent. This intent is to be determined from the legal effect, and not necessarily the effect really supported by the principal, of the language, conduct or circumstances constituting the appointment. As a correlary of this, the authority will be so construed as to protect third persons dealing with the agent, provided the latter acted within

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the real or apparent scope of his authority, although contrary to the intention and expressed desires of the principal. The power is to be exercised for the benefit of the principal, about his private business, and presumably is limited to acts of the kind indicated by the appointment." In speaking of the acts of an agent in the course of his employment it is stated in this volume of Cyc., p. 1585, that the term, course of employment, is broadly said to mean that the act of an agent is within the course of his employment when the agent in performing it is endeavoring to promote his principal's business with the scope of the actual or apparent authority conferred upon him for that purpose.

With these rules before us for our guide it is proper to inquire whether the act of the general agent, Lawrence, in beginning this criminal prosecution against the plaintiff, Howell, was within the actual or apparent scope of his authority or was clearly foreign to the scope of his employment, and if the latter, then the company is not liable for his act. He was appointed general agent to look after, superintend and control the insurance business of the company in the city of Memphis and in the territory within his jurisdiction. It is not possible to conceive that the insurance company thought when appointing this general agent that it would ever be necessary for him to institute a criminal proceeding against anyone who was supposed to have embezzled its funds. His appointment did not expressly authorize him, as is very clear, to prosecute offenders, or supposed offenders, against the criminal laws of Tennessee. Was not such prosecution altogether foreign to the scope of his employment? It was his business to select agents for the company, superintend their work, deliver to them policies issued by the company and to receive from them money collected from the insured and transmit

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the same to the home office of the company at Louisville. It is true that he had apparent authority to take care of whatever property the company may have committed to his care and custody and if this money had reached his hands and he discovered the plaintiff stealing it from where it was kept, or if he believed he had stolen it and that it was on his person, then under a long line of cases, he would have had implied authority to institute criminal proceedings to arrest and detain the offender in order that he might repossess himself of the property for his company, which he then supposed to be on the person of the supposed criminal. Or he might have had a search warrant issued and the plaintiff held and searched, or the premises where he slept searched, in order to discover and repossess for his principal the money supposed to be on him, or in his room. Such proceedings as these would have been for the protection of the company's property and would have been instituted in order to recover possession of it and not to prosecute a criminal guilty of stealing the money.

The Supreme Court of Rhode Island, in the case of *Staples v. Schmid*, reported in 19 L. R. A. (O. S.), 825, held that it was within the scope of the employment of a salesman, who was in charge of a store of goods belonging to his principal, to cause the arrest and search of a person whom he believed to have stolen the property from his custody. The Court in that case said it was the duty of the salesman in charge of the goods, during the absence of his principal, to protect the property from pilfering, and when he thought that a customer in the house had stolen some of it and then had it on his person he had implied authority to have such person arrested, detained and searched in order to recapture the property for his master or principal, and in doing so he was acting for the benefit of his master and within the scope of his employment.

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In the case of *Railway Co. v. Halliday*, decided by the Supreme Court of Oklahoma and reported in 39 L. R. A. (N. S.), 205, that Court held that where the station agent of the railroad company, who had the care and custody of its property and where some of it had been stolen, in furtherance of his master's business and in pursuit of the property swore out a search warrant to search the house of plaintiff in order to find and repossess himself of the stolen property, was in doing so acting within the scope of his general authority and that the railroad company was liable for an action for malicious prosecution, where it appeared that the search warrant was falsely and maliciously sworn out and without probable cause.

The Supreme Court of Maryland, in the case of *Railroad Co. v. Ennalls*, reported in 16 L. R. A. (N. S.), 1100, held that where a policeman, appointed and commissioned by the Governor on the application of the railroad company and paid by it, arrested the plaintiff upon the charge of stealing some of its groceries, which arrest was ordered by the superintendent of the company to protect its property, the superintendent was acting within the scope of his authority in ordering the arrest of the supposed criminal and the company was liable in an action for malicious prosecution when it appeared the party arrested was not guilty. In that case the policeman was appointed to protect and take care of the company's property. It had a store on its premises wherein it kept groceries for sale to its employees, and, finding the plaintiff on its premises with a basket of groceries and believing him to have stolen them from its store, the superintendent ordered the policeman to arrest him in order to protect and recover the company's property, and the Supreme Court of Maryland held that he had authority to direct and arrest the plaintiff, and if it appeared it was malicious and without prob-

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able cause, the company was liable in an action for malicious prosecution.

In the case of *Townsell v. Railroad Co.*, decided by this Court at its April term, 1912, and affirmed by the Supreme Court, reported in 4 Higgins, 211, this Court held that where a railroad depot agent had charge and possession of the property of the company and all freight on its yards, where some of the freight on a car had been stolen and the agent directed a search warrant to be sworn out to search the plaintiff's house to find it, he had implied authority to direct the warrant to be sworn out, and if it was malicious and without probable cause the company was liable for his acts in so doing. This Court further held in that case that whether the agent of the corporation has authority to institute a criminal prosecution or to swear out a search warrant is a question of fact to be decided by the jury.

In all the cases we have just cited the Courts have held the agent possessed implied authority to institute such criminal proceedings, because of the fact that the agent at the time was in possession of corporation property, or his master's property; that it was his duty to look after and take care of it and prevent its being stolen by third persons, and that if he believed or suspected that certain persons had stolen some of it and had it on his person, or his premises, that in furtherance of his master's business and in order to take care of and repossess himself of it, the agent had implied authority from the master, or the corporation, as the case might be, to institute whatever criminal proceedings were necessary to recapture the property, if it was done for that purpose alone. But it is admitted in all these cases that if the agent's purpose in the beginning the criminal suit was to punish a person who had violated the laws of the State, then he had no authority

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either express or implied from his master to begin such proceedings.

There is a class of cases where the corporation has appointed special detectives or agents charged with the duty of looking after the property of the company and preventing its being stolen by criminals. In such cases the detectives or agents are usually invested by the corporate authorities with power to arrest criminals guilty of crimes against the company's property, or to arrest persons attempting to commit an offense against their property. In some cases which we have examined the agent or detective is required, in most instances, to consult a lawyer before making an arrest, but they are authorized to arrest where the offense is committed in their presence. The case of *Eichengreen v. Railroad*, decided by the Supreme Court and reported in 96 Tenn., 299, is an instance of the cases referred to. In this case the plaintiff wanted to buy a ticket from Bowling Green, Kentucky, to Gallatin, Tennessee, and offered in payment of it a counterfeit bill. The detective of the company was present when plaintiff offered to buy the ticket and offered the bill in payment of it and ordered his arrest when he reached Gallatin, Tennessee. The Supreme Court, in passing upon the liability of the railroad company for the acts of its detective, said: "These detectives were employed for the purpose of protecting the property of the company and of ferreting out and prosecuting guilty parties of crimes against the company." It is also stated in the opinion that this particular detective "was employed to look after any irregularities that he saw on the line of the road or division, investigate cases of robbery, obstructions on the track and claims against the company." The Court said that the "attempt to pass a counterfeit bill upon the ticket agent was certainly an offense against the company and, having been committed

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against the company in the presence of the detective, the right to arrest or procure the arrest of the guilty party may fairly be said to have been in the line of his employment, and within the authority conferred upon him." There are many cases in the books holding the same view of the authority of a detective employed to look after and protect the property of the company, to arrest persons attempting to commit offenses against it in their presence, but the case under consideration bears no sort of resemblance to this line of cases.

Again, there is a line of cases that hold that a conductor of a passenger train, whose duty it is to care for and protect the passengers on it and to prevent any kind of injury being inflicted upon them and to maintain good order in the car, has implied authority to have persons arrested supposed to be guilty of any offense while on the car, and if the conductor make a mistake and arrest an innocent person the company is liable in an action for malicious prosecution for the act of the conductor: 14 L. R. A., 798; 29 L. R. A., 465; 40 L. R. A., 473; 90 N. Y., 77, reported in 43 Am. R., 141, and 44 L. R. A., 673.

In the case of *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan., 350, reported in 59 Am. R., 571, it appears that the laws of Kansas authorized the plaintiff in a replevin suit, where the defendant conceals the property sought to be replevined and refuses to deliver it up, to swear out a warrant and have him arrested and held in custody until he delivers to the officers the property sought to be replevined. The sewing machine company had sold a machine to a lady who afterwards married a man by the name of Baker. The company insisted she had not paid for it, while she claimed she had, and the company, having retained the title to the machine, instituted an action of replevin to recover possession of it. When the officer

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applied to the husband of the lady for the machine, he denied having it. Thereupon the local agent, acting for the machine company, ordered and directed the officer having the writ in his possession to swear out a warrant for the arrest of the husband, which was done and the husband arrested and placed in jail until he told where the machine was, when it was recovered by the officer. On the trial it appeared that the contention of the lady who had bought the machine, that she had paid for it, was sustained and that she owed nothing on it. The husband then brought an action against the company for malicious prosecution, and the Supreme Court of Kansas held that the local agent, in ordering the officer to swear out the warrant, was acting within the scope of his employment because he was taking such legal steps as the law permitted to recover possession of the machine, and for that reason the company was liable for malicious prosecution.

In *Railroad v. Bunn*, 57 Kansas, 785, the Supreme Court of that State held that a corporation is only liable for malicious prosecution where the institution and prosecution of the criminal action is within the limit of employment, or scope of the authority of the agent instituting the criminal proceeding. The same rule was held in *Railroad v. Allen*, 70 Kansas, 743, and the company held liable in that case because the agent was acting within the line of his employment, though he violated the positive instructions given him by his principal.

Coming directly to the cases we have found bearing upon the liability of a corporation for malicious prosecution where an agent has instituted criminal proceedings charging the plaintiff with embezzlement, as was done in this case, we will state that we have been unable to find any reported case where a corporation has been held liable in damages in an action for malicious prosecution where its

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agent instituted criminal proceedings against the plaintiff charging him with the crime of embezzlement. The first case to which our attention has been called, or rather which we have been able to find in our investigation of the question, is *Gillett v. Railroad Co.*, 59 Mo., 315, reported in 17 Am. R., 653. In that case the Supreme Court held that a railroad corporation is not liable for malicious prosecution instituted by one of its officers against an employe for alleged embezzlement of its funds, holding that such prosecution was *ultra vires*. From a recital of the facts as they appear in the opinion of the Court, it seems the plaintiff Gillett was in the employ of the railroad company in the capacity of a clerk, and had the control and management of some of its funds as well as the disbursement of such funds; that he was under the control and direction of one Ford, who was the chief secretary and treasurer of the company. Believing that the plaintiff had embezzled some of the funds of the company Mr. Ford made an affidavit that the plaintiff was guilty of the crime of embezzlement of certain funds of the company of which Mr. Ford had control as agent, and upon this affidavit a warrant was issued and the plaintiff arrested upon the charge of embezzlement of the company's funds. Upon a trial of the cause the plaintiff was found not guilty and discharged, and thereupon brought his action against the railroad company for malicious prosecution. In some respects the facts of this case are similar to the one under consideration in that the officer or agent swearing out or making the affidavit was the superior and had control and direction of the employe charged with the crime. In the case now being considered Mr. Lawrence was the superior of the plaintiff Howell, and it was his business to report to and pay over all money coming into his hands to Mr. Lawrence. On these facts the Supreme Court of Missouri held that the

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secretary and treasurer of the railroad company had no authority by virtue of his office and employment to institute a criminal proceeding against another employe upon the charge of the crime of embezzlement. It seems from this case that the Supreme Court of Missouri was of the opinion that in no case was the corporation liable for malicious prosecution unless it was instituted by one who was clearly authorized to begin it, or unless the institution of such prosecution was clearly within the scope of his employment. In the later case of *Boogher v. Life Association*, 75 Mo., 319, the Supreme Court of that State overruled *Gillett v. Railroad Co.*, insofar as to hold that an action for malicious prosecution may lie against a corporation when instituted by one of its agents, either expressly or impliedly authorized to begin it.

In *Carter v. Howe Machine Co.*, 51 Md., 290, reported in 34 Am. R., 311, the Supreme Court of Maryland held that while an action will lie against a corporation for malicious prosecution, yet where the prosecution is set in motion by an employe of the corporation upon a charge of the crime of embezzlement, an express authority or ratification and adoption by the corporation of the acts of its agent must be shown. We quote from the closing part of the opinion of Mr. Justice Alvey in this case as follows:

"From these authorities it is quite clear that, in a case like the present, where the corporation is sought to be held liable for the wrongful and malicious act of its servant or agent in putting the criminal law in operation against a party upon the charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover it should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not in the nature of things be in the exercise of the ordinary duties

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of the agent or servant entrusted with the custody of the company's money or goods; and before the corporation can be made liable for such an act it must be shown either that there was express precedent authority for doing the act or that the act has been ratified and adopted by the corporation."

We do not understand the learned justice to hold that the authority may not come within the implied power of the agent instituting the criminal proceeding, and if such is his meaning, and if he holds that express authority must be shown, then this holding is clearly against the great weight of authority throughout the United States.

The Supreme Court of Mississippi, in the case of *Russell v. Insurance Co.*, reported in 51 L. R. A. (N. S.), 471, held that an agent, to settle the accounts of another agent of the common employer, has no implied authority to institute criminal proceedings against him for embezzlement so as to render the employer liable for malicious prosecution because of his act in so doing. It appears from the facts stated in the opinion that the plaintiff Russell was the local agent of the insurance company and had fallen behind in the payment of what he owed it for premiums collected on policies issued and delivered by him, which premiums he had collected from the insured and owed to the company under his contract with it. One Klein was a special agent of the company, authorized to suspend local agents, to check them up and settle with them for money due the company. It is stated in the opinion that it is not altogether clear from the record what authority Klein actually had to act for the insurance company, but after settling with the agent and demanding the amount due the company he made various efforts to collect it and suggested different expedients by which the local agents could raise the money with which to pay his deficit. These efforts all

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failing the special agent then procured the grand jury of the county in which the agent lived to indict him for embezzlement of the company's funds. The trial of this indictment resulted in the acquittal of the local agent, and he thereupon instituted an action for malicious prosecution. The Supreme Court of Mississippi held that the special agent had no authority, either express or implied, from the company to institute the criminal proceedings so as to make it liable for malicious prosecution.

It was held in *Stone Co. v. Koch*, 37 Ill. App., 595, that an agent who was authorized to collect money due a corporation with authority to bring suit for its collection, has no authority to charge the corporation with his malicious acts in setting in motion a criminal procedure against the debtor. It was stated in the opinion of the Court that if his motive in doing so was to obtain for the corporation a benefit from the prosecution, it would not even in that case be liable, even if the prosecution was in the line of his duty as he understood it, since his duty or authority was not extended by his understanding of either.

In *Dally v. Young*, 3 Ill. App., 39, it appears that the general agent of a sewing machine company began a criminal prosecution against one of the subagents, the charge being embezzlement of funds and notes belonging to the company, and the Supreme Court held that, where an agent instituted a malicious prosecution without the intigation or direction of his principal, the latter will not be liable unless he adopts and continues the same with full knowledge of the circumstances.

In *Daniel v. Railroad Co.*, 136 N. C., 517, reported in 67 L. R. A. (O. S.), 455, it was held that the appointment of one as cashier of a railway station, with power to collect money, give receipts, sell tickets, take care of the money received and send it to the treasurer of the company, does

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not empower him to arrest persons whom he suspects of having stolen money which came into his possession, so as to render the railroad company liable in case he causes the arrest of an innocent person.

In *Willis v. Railroad Co.*, 120 N. C., 512, 26 S. E., 785, the Supreme Court of North Carolina said, "In the absence of express orders to do an act, in order to render the master liable the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment. . . . For illustration, a clerk to sell goods suspects that goods have been stolen and causes an arrest to be made. The master is not liable for the imprisonment or for the assault, because the arrest was an act which the clerk had no authority to do for the master, either express or implied."

In *Redditt v. Singer Manufacturing Co.*, 124 N. C. 100, 32 S. E., 392, the Supreme Court of North Carolina stating the rule against said, "In a vast majority of cases, the principle is recognized that in some way the company must authorize or approve the tortious act of its agent, and it would be unreasonable to hold the company liable on a bare presumption, in the absence of allegations or any proof of authority or ratification."

In *Daniel v. Railroad Co.*, *supra*, Mr. Justice Walker, who delivered the opinion of the Court, finally states the rule we are considering, in this language:

"It may then be gathered from the books, as a general rule, which is clearly applicable to the facts of this case, that if the servant, instead of doing that which he is employed to do, does something else, which he is not employed to do at all, the master cannot be said to do it by its servant and, therefore, is not responsible for what he does. It is not sufficient that the act showed that he did it with the intent to benefit or to serve the master. It must be some-

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thing done in attempting to do what the master has employed the servant to do."

In the English case of *Allen v. Railroad Co.*, 6 Q. B., 65, Mr. Justice Blackburn, who delivered one of the opinions of the Court in that case, said: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks best to punish a person who he suspects has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property. It is done merely for the purpose of vindicating justice."

In *Mulligan v. Railway Co.*, the New York Court of Appeals, in an opinion reported in 14 L. R. A. (O. S.), 791, held that a ticket agent of a railroad company who takes a bill believing it to be counterfeit, in payment for tickets, and immediately procures the arrest of the person from who he takes it, is not acting within the scope of his business so as to make the railroad company liable for malicious prosecution, although the arrest was wrongful and the bill proves to be a good one. In the opinion delivered by Mr. Justice O'Brien he says the agent "did not take the bill in the course of his business as agent, but for the purpose of entrapping persons that he believed to be engaged in the commission of crimes. . . . If he had been cheated or imposed upon by the plaintiff, or if he honestly believed he had been, and then attempted to recover what he supposed he had lost, it might then be said that he was engaged in the protection of the property and interest of the defendant and, therefore, acting within the line of his duty."

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Where a superintendent of a railroad ordered a policeman, who was appointed by the governor on application of the company, and which policeman was paid by it, to arrest a person for an assault and battery committed upon the superintendent, and the party arrested was discharged, the Court held that the company was not liable for malicious prosecution for the acts of the superintendent in ordering the arrest to be made: 8 L. R. A. (O. S.), 846.

In *Railroad Co. v. Brewer*, the Supreme Court of Maryland, in an opinion reported in 27 L. R. A. (O. S.), 63, held that the company was not liable in an action for malicious prosecution where its superintendent ordered the arrest of a passenger for placing in the fare box a counterfeit coin in payment of his fare. In that case the passenger actually placed a lead coin in the box in payment of his fare. The conductor saw him do it and urged him to put some real money in the box for his fare. He refused to do so, and immediately thereafter, when the fact was reported to the superintendent, he ordered the arrest of the passenger, who, being discharged, brought an action against the company for malicious prosecution; and on these facts the Court held the company was not liable.

The Supreme Court of Arkansas, in an opinion reported in 40 L. R. A. (O. S.), 473, held that where a conductor of a street car only had authority to put a passenger off the car, it would not be liable in an action for malicious prosecution where the conductor had the passenger arrested for an offense of which he was found not guilty.

We have reviewed at length these cases, and in fact all of them we have examined in order to determine for ourselves if this general agent, Mr. Lawrence, had authority from the company, either express or implied, to institute this criminal proceeding against the plaintiff. As we have

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said, there are three classes of cases where the agent has the implied authority to make an arrest, and these classes of cases we have mentioned and set out somewhat in detail the reasons for the holding in each case; but we are unable to find any case where the Courts in any jurisdiction have held that a general agent of an insurance company has implied authority from his principal to begin a criminal proceeding charging a subagent with the crime of embezzlement. In this case the president of the company testified that he knew nothing of this criminal proceeding until after this suit was instituted. The affidavit made by Mr. Lawrence does not charge that the money embezzled by the plaintiff was the property of the company, but of Aiken & Lawrence, agents. In fact the affidavit does not disclose any connection between the plaintiff Howell and the insurance company, nor indicate remotely that he was at work for it and that the money embezzled was collected by him for it. When we come to examine the indictment to which Mr. Lawrence's name was marked as prosecutor, we find that it nowhere charges that the plaintiff was in the employ of the Insurance Company in any capacity. On the contrary, it charges that he was in the "employ of W. H. Lawrence as agent and collector, and by virtue of said employment did collect and receive into his care, custody and possession, from divers and sundry persons . . . \$36.90, . . . the proper goods and chattels of W. H. Lawrence, which sum aforesaid the said L. M. Howell by virtue of said employment aforesaid, was required to turn over, deliver and account for said money to said W. H. Lawrence, all of which he failed and refused to do." Hence, we find no charge in the indictment that the money collected and embezzled by plaintiff was the property of the Insurance Company. It is not charged that there was any employment by the Company of Howell, or that he

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collected this money for it and failed to account for and pay it over to it. The affidavit proceeds upon the ground that the money was the property of Aiken & Lawrence, while the indictment proceeds upon the idea that plaintiff was in the employ of Lawrence, and as his agent collected this money, which was Lawrence's property, and which the plaintiff refused to account for and pay over to him. On the face of the criminal proceeding there is nothing to indicate that Mr. Lawrence was acting for or on behalf of the Insurance Company. In his testimony he says he was liable for these funds whether he collected them from the plaintiff or not, and we apprehend that to be true. So, there is nothing in this record from which an implied authority can arise under which Lawrence was authorized to institute this criminal proceeding as agent for and in behalf of the Insurance Company, so as to make it liable to an action for malicious prosecution in the event the plaintiff should prove, or it should appear in the criminal proceeding that he was not guilty of the charge preferred against him. Then, it clearly appears from what proof there is as to the scope of the employment of the general agent, Lawrence, or of his authority under his employment as general agent, that the Insurance Company never contemplated, or thought of, authorizing him to institute a criminal proceeding in any character of case. The proof clearly indicates that the Company had no knowledge, when these criminal proceedings were begun, that the plaintiff was in default in any respect. In fact, its only knowledge of Mr. Howell was through the small business he did for it in Memphis, and this knowledge was gained only through the various applications he took for insurance and the policies thereon sent to him for delivery. It had no direct communication, either written or verbal, with Howell, so far as this record discloses. It is doubtless true

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the Company knew through its correspondence with its general agent, Mr. Lawrence, that it had a soliciting agent in Memphis by the name of Howell. But that it did not expressly authorize this criminal proceeding there can be no doubt, and in fact we do not understand learned counsel to insist the general agent had any express authority. The general agent's business in Memphis was to employ or appoint subagents to receive applications for insurance for them, deliver to them policies of insurance to be by him delivered to the insured, and to collect from the subagents premiums received by him and forward the same to the company at its headquarters in Louisville, Ky. This particular fund of \$36.90 was never in the custody or possession of the general agent so as to bring the criminal proceeding within that class of cases where proceedings are instituted for the protection and recovery of the corporation's property. The general agent had no such authority or power, nor any such duty to perform, as is conferred and rests upon the passenger conductor of a railway train. He was not specially appointed by the Company to investigate crime and arrest offenders guilty of crime against the company's property, so as to bring him within that line of cases where railroads have appointed agents and detectives for such purposes. It cannot, from any view we take of the authority of the agent, be held that he was invested with the power to institute criminal proceedings for violation of the criminal laws of the State, and he has had only such power as was expressly conferred upon him by his appointment, or such implied authority as was necessary for him to have in the execution of the express powers granted him. It was not necessary, in order to carry out the authority conferred upon him by his appointment, that he prosecute criminally other employes of the Company. This Company had no interest in such prose-

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cution. Its headquarters were in Louisville, and it looked to its general agents for all the money that should come through him to them, and it was, therefore, a matter of no consequence to the Company whether this man was prosecuted criminally or not. It was assured of receiving this \$36.90 from its general agent, Mr. Lamrence, who was primarily liable to it for this money and, consequently it could have no interest in the criminal prosecution of the plaintiff for embezzling this money.

On the undisputed facts of this case, we have reached the conclusion that, as a matter of law, the general agent had no express or implied authority from the Company to institute this criminal prosecution so as to make it liable in an action for malicious prosecution, and it therefore follows that the judgment of the trial Judge was correct, and that he should have sustained the motion for peremptory instructions, and, having failed to do so, we will enter in this Court the judgment he should have entered in the lower Court, and dismiss this suit so far as the Insurance Company is concerned, at the cost of the plaintiff below.

Thrasher v. Bratton.

H. H. THRASHER, JR., v. JAMES BRATTON.

Affirmed substantially by Supreme Court, 1915.

MINOR. *Liability for acts of agent while operating automobile.*

A minor who is the owner of an automobile is personally liable for the negligence of his chauffeur resulting in personal injuries to a pedestrian, especially when the minor owner was present at the time.

FROM KNOX COUNTY.

Appeal in error from Circuit Court of Knox County.
VON A. HUFFAKER, Judge.

WALTER S. ROBERTS for Plaintiff in Error.

HARRY HALL for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS is an action by Bratton against Henry Thrasher, Jr., to recover damages for personal injuries sustained in a collision with an automobile on Clinch Street, in the City of Knoxville. The jury returned a verdict of \$1,500. The Circuit Judge declined to grant a new trial and pronounced judgment. Thrasher excepted and prayed an appeal and is here assigning numerous errors. We shall advert to three of them only.

The first in importance is the insistence that plaintiff in error was at the time of the accident a minor, and that

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the automobile was being operated by one Henry Maples, who was his agent only, if he sustained any relation toward Thrasher, and that Thrasher could not be held liable for the negligence of the agent.

The rule seems to be established in this State that persons under disability are not liable for the torts committed by their agents. This was so held in the case of *Collier v. Struby*, 15 Pickle, 241, in an effort to hold a wife liable. The logic of that case extends to and would cover the situation of a minor. The later case of *Lowry v. Cate*, 108 Tenn., 54, expressly decides that a minor cannot be held liable even for negligence if the negligence grows out of or is connected with the breach of a contract. But an important qualification of the rule is intimated in the latter case and is undoubtedly a sound one, namely, that notwithstanding a contract, if the act of the agent committed in the presence of the minor employer is wilfully and knowingly done within the scope of the authority conferred, the minor should be held liable; this upon the principle that notwithstanding a contract relation the minor is liable for his wilful torts. The exception is further extended by some of the authorities so as to hold the minor master liable for all negligent acts of the servant committed in his presence: 22 Cyc., 620-621. We must not be understood as sanctioning this as a rule of universal application. But when our automobile Act of 1905, Chapter 173, is brought into consideration, in connection with the common law injunction to afford a remedy for every wrong, we think it entirely sound and justifiable to hold the minor owner of the machine liable for the negligence of his agent committed while the minor is present and giving directions. It cannot be disputed but that a minor of discretion can control and direct the con-

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duct of his chauffeur; and to exempt the owner from liability because of his minority would import an unauthorized exception into the statute and would be detrimental to public security. Too often is it the case that parents buy these engines of harm for their minor children. Upon the principle contended for an injured one would be absolutely without redress.

We are of opinion that the learned Circuit Judge was not in error in striking out the plea of minority and declining the request embodied in that defense. We are of opinion from the facts, elaboration of which we deem unnecessary, that at the time of the accident Maples was an agent of Thrasher, and for the time being under his control. The fact that Maples was in the service of the garage company is of no juristic concern in determining the relation between Thrasher and himself, for the reason that he was so identified with Thrasher as to be his representative and fellow tort feasor. The Act of 1905 denounces the violation of any of its provisions a misdemeanor. It would certainly be strange to hold that Maples, the agent, could be punished and that his master, acquiescing in his conduct, and virtually commanding it, could not be held. The rule of universal application that all parties who cooperate in the commission of an offense may be held responsible.

Claypool v. Patrick.

W. H. CLAYPOOL ET AL. v. D. C. PATRICK.

Writ of certiorari denied by Supreme Court, 1916.

1. GARAGE KEEPERS. *Bailees for hire. Degree of care.*

Garage keepers are mere bailees for hire and are bound to exercise reasonable care only. They are not insurers of the safety of machines placed in their care.

2. SAME. *Burden of proof in case of fire.*

The burden is on the owner of a machine destroyed by fire in a garage to show that the keeper was guilty of negligence. In such case there is no presumption of negligence from the fire alone.

FROM HENRY COUNTY.

Appeal in error from the Circuit Court of Henry County. THOS. E. HARWOOD, Judge.

LAMB & FITZHUGH for Plaintiffs in Error.

TAYLOR & HUDSON for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

DURING the early part of 1914, plaintiffs in error were the owners or managers of a garage and automobile repair shop in the town of Paris. They kept machines for hire, also automobiles placed with them for safe keeping, and they likewise did indiscriminate repairing for the public.

Patrick, the owner of a machine, contracted with plaintiffs in error for space in their garage in which to store

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his automobile while not in use. For this rent or service he paid \$3.00 per month. On a day in March of 1914, while Patrick's machine was stored among and with others in the garage, a fire was started, and consumed this machine, together with several others, before the flames could be extinguished. He instituted this suit to recover of plaintiffs in error the value of the machine, evidently proceeding upon the theory that they as bailees were guilty of negligence with respect to the management of the garage, and in particular with respect to the origin of the fire. Two counts were inserted in his declaration. He charged generally in the first that the bailees were guilty of negligence in their method of handling gasoline, particularly in letting it spread over the floor and rendering explosion likely. In the second count it was averred that the fire was occasioned by negligence in permitting servants or those present at the time of the origin of the fire to smoke cigarettes, pipes or cigars.

The controversy was tried by Judge Harwood without the intervention of a jury. He found in favor of plaintiff below and rendered judgment for the value of the automobile. There was an appeal, followed by numerous assignments of error. While not requested so to do, the learned Judge filed a written finding of fact, together with his conclusions of law.

After a painstaking examination of the record we feel constrained to dissent from the views entertained by the trial Judge. Elaboration of our position will not be necessary. We place our decision upon the two grounds that in the first place the origin of the fire is unknown and unknowable; and in the second place that the conduct of plaintiffs in error and their servants as disclosed by the record does not warrant the imputation to them of lack of ordinary care.

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As before observed, plaintiffs in error were bailees for hire and were onerated with the duty of exercising ordinary care: *Lancaster Mills v. Compress Co.*, 89 Tenn., 1; *Insurance Co. v. Schrieber*, 45 L. R. A. (N. S.), 316; *Roberts v. Kinley*, 45 L. R. A. (N. S.), 938. It was therefore incumbent upon Patrick to introduce evidence tending to show that plaintiffs in error had not exercised ordinary care upon the occasion in question, and that this omission was the proximate cause of the loss of his machine. This burden was not discharged by merely proving that the machine was lost by a fire. *Lancaster Mills v. Compress Co.*, *supra*; 29 Cyc., 593-45. We shall not enter upon an extended discussion of the question as to whether the doctrine of *res ipsa loquitur* applies in cases of explosion, as in *Young v. Bransford*, 12 Lea, 232, and *Gill v. Brown*, 3 Thompson, 174. This is rendered unnecessary by the peculiar status of the case at bar. Here the whole method of the operation, including all the attending circumstances resulting in the fire, was developed by the evidence. When this is so there is no room for the application of the maxim. *Sweeney v. Irving*, 228 U. S., 233; 57 Law Ed., 815. It is true that the immediate physical cause of the explosion here is not shown. But the circumstances rebut the presumption of negligent handling, and hence destroy the probative force of the explosion. Plaintiffs in error were not insurers. Hence the injustice of imputing to them a breach of duty without any just foundation for the charge.

Summarizing the testimony it is as follows: A machine whose gasoline tank was leaking was brought into the garage for repairs. It became necessary to empty the tank and to that end a large can was placed underneath, and the cock of the tank was turned so as to allow the gasoline to run into the can. This was a customary way; in fact,

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the evidence is that it was the only known method. It was discovered that there was more gasoline in the tank than the can would hold, and it became necessary to shut off the stream. The party guiding the operation tried to turn the cock, but could not do so with his hands, and directed a near-by helper to pick up a wrench and strike it. We shall assume that this was done. Immediately thereafter the fire in question started by ignition of the gasoline. No one saw a spark, and there is no pretense that any one near-by was smoking or struck a match, or that there was any other than atmospheric heat near-by. It is true that the gasoline spread out over the concrete floor, or at least we must take this to be established; and it must also be taken as true that the liquid spreads and evaporates quickly in warm weather and is more likely to explode. But granting all this, there is no suggestion that a spark from any place or point caused the ignition. It is true that the effort is made to prove an admission of one of the proprietors that there was a spark. But this will be found upon analysis to be simply the expression of an opinion. It is clear to us that the origin of this fire cannot be ascribed to any particular act, or at least there is not in the testimony anything which justifies the ascribing of its origin to any negligent act; and being of this opinion an adjudication of non-liability of the keepers must follow.

Even if we should feel constrained to resort to the maxim or doctrine above referred to, its probative force (and it is simply a rule of evidence), is destroyed by the evidence adduced. In other words, the circumstances repel the imputation of negligence, or at least put it into the realm of conjecture, which is not sufficient in actions predicated upon ordinary negligence. Moreover, there is nothing that justifies the inference that plaintiff in error deviated from the standards of ordinary care. It was shown that

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they had themselves several machines on hand, and much other valuable property, and that their belongings were just as much exposed to hazard as was the machine of Patrick. And yet it never occurred to them that they were exposing their property to danger. The only inference is that they pursued with respect to the property of plaintiff just that course which any prudent manager of automobile stables would have observed with respect to their own property and affairs. This rebuts the presumption of negligence. *Railroad v. Wade*, 127 Tenn., 154, wherein it was held that the degree of care which a prudent man might be expected to exercise toward and about his own affair was the standard. It would certainly be astounding to charge plaintiffs in error with negligence the consequences of which would visit upon them extensive loss. Again, there is no foundation for the imputation that plaintiffs in error could or should have anticipated an explosion. Hence, they were not guilty of negligence: *Telegraph Co. v. Schriver*, 4 L. R. A. (N. S.), 678; *Miller v. Railroad*, 18 L. R. A. (N. S.), 849. Besides, it was intimated by our Supreme Court in *Grigsby v. Bratton*, 128 Tenn., 597, that the observance of custom in the handling of gasoline would rebut negligence; and it is deducible that dealer and customer were both charged with knowledge of its properties, and that it would be wrong to hold the dealer responsible for all explosions. .

It results from the foregoing that the judgment of the lower Court must be reversed and the case dismissed at the cost of appellee, we being of opinion as we stated above that this fire must be attributed to sources that would not have been avoided by the exercise of ordinary care; and, further, that there is nothing to warrant the inference that plaintiffs in error were guilty of negligence. .

Hall v. Harper.

HARRY S. HALL, ADM'R, v. J. S. HARPER.

Affirmed by Supreme Court, 1915.

1. **ASSIGNMENT OF ERRORS AS TO ADMISSION OF EVIDENCE.** *That there is no evidence. Admission of incompetent evidence.*

An appellant cannot under an assignment that there is no evidence to support a verdict insist that illegal evidence was admitted. He should have made specific assignment with respect to the admission of such evidence.

2. **EVIDENCE.** *Transactions with or statements by deceased. Must be objected to.*

When a party undertakes to prove transactions with or statements by a deceased, it is incumbent upon the personal representative through counsel to make seasonable objection. It is too late after admission of the evidence without objection and after extended cross-examination with respect thereto to make the point that the evidence should not have been admitted.

3. **SAME.**

The right to object to this species of evidence may be waived by extended cross-examination where there was no original objection. But if there be objection to evidence, the right is not lost by examination.

4. **USURY.** *Custom.*

A borrower may in some cases show that his lender was in the habit of collecting usury.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
VON A. HUFFAKER, Judge.

Hall v. Harper.

HARRY S. HALL and ——— DINSMORE for Plaintiff in Error.

O. L. WHITE for Defendant in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

DEFENDANT in error Harper brought this suit against plaintiff in error Hall, administrator of one Bean, deceased, to recover usury upon a loan of \$10.00. It was tried by the Circuit Judge without the intervention of a jury. He pronounced judgment in favor of Harper for the sum of \$101.05 and costs. After his motion for a new trial was overruled, plaintiff in error prayed and obtained an appeal to this Court.

It is urged as a ground for reversal and dismissal that the judgment of the lower Court was based wholly upon the testimony of the defendant in error respecting transactions with and statements by the intestate of plaintiff in error. This is not literally so, but even if it were, we are inclined to the opinion that the judgment nevertheless cannot be assailed.

The proper assignment of error would have been to the action of the trial Judge in permitting Harper to testify as to transactions with or statements by the deceased, specifying and referring to the objectionable evidence and pointing out at what page or pages in the record the evidence could be found, and likewise the ruling of the Court thereon. Instead, we find the assignment of error upon which the argument is based to be simply that the Court erred in holding that Harper was a witness competent to testify in the case as to transactions with or statements by the decedent.

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But passing this question of procedure by, the record fails to show that plaintiff in error made specific objection to the admission of the testimony of Harper with respect to his dealings with Bean. It is stated in the bill of exceptions that at the conclusion of all the evidence the administrator insisted that as Harper was a party to the suit and as the only evidence of usury was out of his mouth touching transactions with and statements by the deceased, there was no competent evidence before the Court on which a judgment could be raised.

Treating this as in some respects an objection (we do not hesitate to say that objections to evidence must be more specific), we find plaintiff in error confronted with other and insuperable difficulties. In the first place, so far as the record discloses, he sat by and permitted Harper to detail at length his transactions with Bean without objection. It will also be noted that he did not move to strike the evidence out, as was the correct practice, but simply insisted that there was no competent evidence on which a judgment could be based. It has been held by a number of Courts of distinction in treating of this subject of the admitting of evidence against the estate of a decedent, that objection must be made when the evidence is first proposed, and that it is too late to make the exception on cross-examination or after the introduction of all the evidence. 40 Cyc., 2349-50. Further, it is laid down in 2 Elliott, Gen. Prac., 594, that a party who has sat by and permitted illegal evidence to be admitted and then cross-examined the parties about it and let it sink into the minds of the jurors, has no absolute right to have it excluded on motion. But we do not go to the extent of holding so in the present case.

But there is another and a serious embarrassment to plaintiff in error, and that is the fact that he examined

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Harper at great length on cross-examination about the transactions with or statements with Bean, and really brought out more on this cross-examination than had been elicited on the examination in chief. We find no authorities in Tennessee bearing upon this exact point, but in a number of other States it has been held that the pursuit of this method is an undoubted waiver of the right to object to the competency of the witness as to these matters, and that it has the effect of making competent all the answers of the witness: 40 Cyc., 2344, and cases cited under Note 37. It must be borne in mind that we have not here the case of a party who makes an objection to what he deems to be incompetent evidence and proceeds to make the best of a situation forced upon him by the Court and his adversary. On the contrary, the party complaining voluntarily proceeds to interrogate the witness about matters respecting which the interrogator certainly had the right to insist upon silence. On the contrary, he elected to cross-examine minutely and lengthily as to these subjects. It is not illogical to hold that he is not in position to assign errors.

It is said in the 3rd and in the 4th assignments of error, that there is no competent evidence upon which the judgment could be based after excluding the incompetent evidence. These assignments cannot well be sustained after holding that the administrator is not in position to insist upon the exclusion of the evidence of Harper. But we shall recur to this subject after disposing of Assignment No. 2.

This assignment is to the effect that the Court admitted over objection evidence of several witnesses to the effect that it was the custom of Bean, the intestate, to lend his money at the rate of ten cents for each dollar for each week. Authorities are cited which bear out apparently

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this contention: Ency. of Evidence, Vol. 13, 400-402, 403. But a careful reading of the text and the authorities upon which it is based will convince anyone that when the evidence of this custom relates to or is connected with the transaction in issue it is competent. The testimony admitted in this case is to the effect that Bean was foreman or timekeeper or paymaster of the workshop at which Harper and the several witnesses testifying worked, and that it was the custom of Bean to lend money to all these employes at the rate above named, and to take an assignment or to reserve the right to deduct his interest from the pay of these workmen at the end of each week. The evidence is simply to the effect that all the employes understood (and this in fact was admitted by Bean to a third party), that he was in the habit of lending them money and taking their time scrip or card as security and deducting therefrom his interest charges. The testimony of this custom is followed by evidence from the same witnesses to the effect that they had seen Harper at recurring days pay Bean one dollar; and there is corroboration in the testimony of Mr. Hall himself that he as administrator found at the desk of Mr. Bean a scrip signed by defendant in error showing that he was indebted to Bean to the extent of ten dollars.

There is considerable uncertainty as to the time when the several loans were made by Bean to Harper, but we are of opinion that it is definite enough at least to sustain the recovery to the extent allowed by the Circuit Judge. It clearly appears that three dollars were borrowed in November, 1907, and two dollars more within two or three weeks thereafter. At 50 cents per week for this period of five years and over the aggregate would exceed the amount of the judgment below.

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After considering the whole record and weighing the procedural and substantial matters we are convinced that there are no substantial reasons justifying a reversal. We therefore affirm the judgment of the lower Court with costs.

KNOLA HOWARD V. SOVEREIGN CAMP OF THE WOODMEN
OF THE WORLD.

Writ of certiorari denied by Supreme Court, 1916.

1. *INSURANCE. Fraternal insurance. Local lodge as agent of Grand Lodge.*

With respect to insurance policies local lodges of the Woodmen of the World Order are treated as general agents of the Grand Lodge.

2. *SAME. Waiver of provisions in policies.*

And such local lodge may for the Grand Lodge waive provisions of insurance policies with respect to the qualifications and habits of members of the local order who seek and obtain life insurance.

3. *SAME. Waiver of provisions against intemperance. Knowledge thereof by officials of the local lodge. Waiver.*

Where the holder of a policy in the Woodmen of the World was before its issuance a confirmed drunkard and was so known to the officers of the local lodge at the time of his acceptance as a member, and whose intemperate habits continued for a great length of time with the knowledge of the local officials, who continued to receive his dues and to transmit his portion thereof to the insurance department, the order will be held estopped to question the validity of the pol-

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icy or the right of the beneficiary to collect, notwithstanding explicit provisions in the by-laws and in the policy to the effect that intemperance and immoral acts directly producing death voided the policy.

FROM LAKE COUNTY.

Appeal in error from the Circuit Court of Lake County.
JOSEPH E. JONES, Judge.

F. J. CALLAHAN for Mrs. Howard.

PIERCE & FRY for Insurance Order.

MR. JUSTICE MOORE delivered the opinion of the Court.

THIS suit is brought by the plaintiff as the widow of Arch Howard to recover on a beneficiary certificate issued to her husband on the 21st of September, 1908, the sum of \$1,000, the interest thereon and \$100, the value of a monument agreed to be placed at the grave of her husband, and attorneys' fees for the collection of said amounts. The case was tried by the Circuit Judge without a jury, and upon an agreed statement of facts, together with the application, the policy issued thereon and the constitution and by-laws of the Order, and on some depositions offered by the defendant in evidence at the hearing of the cause. At the conclusion of all the proof the trial Judge rendered judgment for the plaintiff against the defendant for \$1,000, the amount set out in the beneficiary certificate, together with 6 per cent interest and also \$100, the price of the monument described in said certificate, the total amount of which judgment was \$1,155. The defendant's motion

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for a new trial being overruled it has appealed in error to this Court and seeks a reversal of the judgment upon various grounds.

There is really but one determinative question involved in the record, and if we should reach the conclusion that plaintiff's insistence, that the defendant had waived certain provisions, stipulations and conditions set forth in the application of the deceased, and in the policy issued to him thereon and in the constitution and by-laws of the Order, then it will not be necessary to consider any other question, for the judgment of the lower Court in such case must be affirmed.

The Order, known as the Sovereign Camp of the Woodmen of the World, has for its object to "combine white male persons of sound bodily health, exemplary habits and good moral character between the ages of eighteen and fifty years, into a secret, fraternal and beneficial order; provide funds for their relief; create a fund from which, on reasonable and satisfactory proof of death of a beneficiary member who has complied with all the requirements of the Order, there shall be paid a sum not to exceed \$3,000 to the person or persons named in his certificate as beneficiary." Its objects as above set forth are stated in the constitution of the order, from which it appears that it has what it calls a sovereign camp, which has original and appellate jurisdiction in all matters pertaining to the general welfare of the order. It also has what it calls camps, chartered and organized under the authority and by the direction of the sovereign camp. Both camps have their respective offices with special and specific duties. In order to become a member of a camp application for membership must be made to the camp and a certain fee paid. If such applicant becomes a member he is then required to pay monthly, certain sums of money so long as he remains such

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member. The chief officer of each camp is denominated the Consul Commander. It also has a clerk, banker, physician, as well as other officers not necessary to be mentioned. The duties of the Consul Commander as specifically set out in the constitution, are to sign beneficiary certificates issued to the members. Among the duties of the clerk of the camp, is to have charge of the records, attend to its correspondence and sign the beneficiary certificates. The clerk collects all monies payable by an applicant for admission into a camp and all the dues payable by the members to the camp or for the sovereign camp, and is required to remit them to the Sovereign clerk. The camp physician must comply with the instructions of the Sovereign physician and recommend no applicant unless he be found on careful examination to be physically and mentally sound, of exemplary habits and of good moral character. A part of the funds paid by the members of the local camps are used in paying the claims of those holding a beneficiary certificate upon the death of a member holding such certificate. This fund is held by the Sovereign banker and paid out on such certificates when such claims are ordered to be paid by the proper Sovereign officer. After an application is presented to the camp for membership, it is referred to a committee of three members who report on the applicant and whether such report is favorable or not, the members of the lodge then vote on the application, and if it is rejected that is the end of the matter so far as the applicant is concerned. If the vote is favorable to the applicant, it then becomes the duty of the camp physician to examine him, and such examination when completed is to be forwarded to the Sovereign clerk. If the application is then approved by the Sovereign physician, a certificate is issued to the applicant, attested by the proper officers and forwarded to the clerk of the camp, who is

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required to notify the applicant, after which he is then inducted to the mysteries of the secret work of the order and becomes a member of the camp with full fellowship. An applicant cannot be introduced into any camp until his certificate is received by the clerk of the camp and unless he is at the time in good health. The beneficiary certificate cannot be delivered to the applicant until it is signed both by the clerk of the camp and the Consul Commander. The constitution provides, among other things, "If the member holding this certificate . . . shall become so far intemperate in the use of intoxicating liquors as to produce delirium tremens, . . . or shall die . . . from the direct results of the drinking of intoxicating liquors, . . . or from disease resulting from his own vicious intemperance or immoral habits, act or acts, . . . this certificate shall be null and void and of no effect, and all monies which shall have been paid, and all rights and benefits which have accrued on account of this certificate, shall be absolutely forfeited without notice or service." It is provided that, "If complaint is made by a member having knowledge of the same to the Consul Commander, either publicly or privately, of any conduct of a member of this camp which is unbecoming or likely to bring disrepute on himself, his family or the Order, . . . for deserting his family or drunkenness, . . . it shall be the duty of every member, as soon as he shall be reliably informed or have personal knowledge of any of the offenses, to inform the Consul Commander as aforesaid at the earliest opportunity." There are ample provisions made in the constitution for preferring charges against such member, giving him notice of the time and place of his trial on such charges and of the trial of the same, and if found guilty, punishment is to be inflicted upon him as decided by a vote of two-thirds of the members of the camp. If found

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guilty of the charges, he may be expelled from the camp, or suspended, or fined, or reprimanded, as the members of the camp may determine by ballot after the truth of the charges have been sustained by a vote of the members.

The beneficiary certificate has the following clause in it: "This certificate is issued and accepted subject to all the conditions on the back thereof, and subject to all the laws, rules and regulations of this fraternity now in force or that may hereafter be enacted, and shall be null and void if said sovereign (the insured) does not comply with all of said conditions and with all of the laws, rules and regulations of the Sovereign Camp of the Woodmen of the World, that are now in force or which may hereafter be enacted, and with all the by-laws of the camp of which he is a member."

On the back of each certificate issued to members is the following, which is made a part of the contract of insurance: "If the member holding this certificate shall . . . become so far intemperate from the use of intoxicating liquor as to produce delirium tremens, . . . or shall die . . . from the direct result of the drinking of intoxicating liquors, . . . or from a disease resulting from his own vicious intemperance or immoral habits, act or acts, this certificate shall be null and void."

In the constitution of the Sovereign Camp it is provided: "The knowledge of any officer or of any of the members of the camp that a member thereof has become so far intemperate from the use of intoxicating liquors as to produce delirium tremens, . . . or has violated any of the provisions of these laws; the receipt of his camp of payment of any dues or assessment, or payment by him of the same shall not in any manner make the Sovereign Camp liable on his certificate, when by these laws his certificate is made null and void and all his rights as a member forfeited."

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Another provision of the constitution of the Sovereign Camp is in this language:

"No officer, employe or agent of the Sovereign Camp, or of any camp, has the power, right or authority to waive any of the conditions upon which beneficiary certificates are issued, or to change, vary or waive any of the provisions of this constitution or these laws; nor shall any custom on the part of any camp or any member of camps, with or without the knowledge of any Sovereign officer, have the effect of so changing, modifying, waiving or vacating such laws or requirements. Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the constitution and laws then in force, or thereafter enacted. The constitution and laws of the Sovereign Camp of the Woodmen of the World now in force, or which may hereafter be enacted, the application and certificate shall constitute a part of the beneficiary contract between the Order and the member."

It appears that plaintiff's husband, Arch Howard, became a member of Cottonwood Camp, No. 176, located at Tiptonville, Lake County, Tenn., on the 12th of October, 1908, and that a beneficiary certificate was issued to him of that date, in which it was agreed to pay his widow, the plaintiff, Knola Howard, after his death, if then in good standing as a member of the fraternity, the sum of \$500, should he die during the first year of his membership, and \$750 should his death occur during the second year of his membership and \$1,000 should he die after the second year of his membership. The deceased, Arch Howard, died on the 15th day of May, 1915, he then being a member in good standing of the fraternity with all of his dues and assessments levied against him by the camp fully paid at and before his death. Within the time prescribed by the constitution of the Order, plaintiff furnished the

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Sovereign Camp with the proofs of the death of her husband in the manner and as required by its constitution and by-laws, and demanded payment to her by it of the sum of \$1,000. It having been made to appear to the Sovereign Camp that the cause of the death of Arch Howard was delirium tremens, caused or produced by the excessive use of intoxicating liquors, the Sovereign Camp refused to pay the amount of the beneficiary certificate to the plaintiff or to recognize its liability to her for any amount on account of and growing out of his membership in the Cottonwood Camp, and hence, she brought this suit to recover what she felt was justly due her.

The following is in part the agreement entered into by counsel for the parties, the remainder not being necessary to copy herein, which agreement was used as evidence on the trial of the cause:

"5th. It is agreed that Arch C. Howard became so far intemperate from the use of intoxicating liquors to produce delirium tremens, and that he died from the direct result of the drinking of intoxicating liquors.

"6th. It is agreed that Arch C. Howard, the member of defendant Order, had before becoming a member of defendant Order, drank intoxicating liquors to an excess, all of which was known to the officers of the local camp at Tiptonville, Lake County, Tennessee, and that he continued to drink intoxicating liquor during the full term of his membership in defendant Order, and up until the date of his death. It is also agreed that during the membership of Arch C. Howard he drank intoxicating liquor to such an extent that it produced delirium tremens and that the camp physician of the local camp of Tiptonville treated the member, Arch C. Howard, for delirium tremens as many as twenty times during the membership of Arch C. Howard in defendant Order; and that all of the offi-

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cers of the local camp at Tiptonville had knowledge of this fact. It is further agreed that the officers of the local camp No. 176 of the Woodmen of the World at Tiptonville, with full knowledge of the fact that Arch C. Howard was drinking intoxicating liquor to excess and that the drinking of intoxicating liquor had during Arch C. Howard's membership in defendant Order caused delirium tremens some twenty times, continued to collect the dues and assessments made by defendant against the member, Arch C. Howard, and remit them to defendant at its home office at Omaha, Nebraska, and that said dues and assessments were accepted by defendant.

"7th. It is also agreed that Knola Howard, the complainant in this suit, was the wife of Arch C. Howard, the beneficiary under the certificate No. 21664, issued by defendant to Arch C. Howard, its member, and that she is the widow now of Arch C. Howard, deceased."

This agreement was made in lieu of proof of the facts stipulated above therein and to save costs and expense of proving these facts by witnesses. It will be noted that this agreement recites that Arch Howard died in Lake County, Tennessee, on the 15th of May, 1915, a member of the defendant Order, in good standing in that no charges had ever been made against him and that all dues and assessments were fully paid. It is further stipulated in said agreement that "Arch Howard became so far intemperate from the use of intoxicating liquors as to produce delirium tremens, and that he died from the direct result of the drinking of intoxicating liquors." The agreement of counsel shows Howard drank intoxicating liquors to excess before he became a member of defendant's camp, and that this fact was known to the officers of the camp at Tiptonville, of which he was a member. It is further agreed that he continued to drink such intoxicating liquors during

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the time of his membership in said order and until his death. It is further agreed that during the time of his membership he drank liquor to such an extent that it produced delirium tremens and that the camp physician of Cottonwood Camp treated him for delirium tremens as many as twenty times during his membership. It is likewise agreed that all of the officers of the local camp at Tiptonville had knowledge of this fact and that such officers with full knowledge of the fact that Howard was drinking intoxicating liquors to excess and that such drinking caused delirium tremens twenty times, continued to collect the dues and assessments levied by the defendant against him and remit them to the defendant at its home office at Omaha, Nebraska, and that such dues and assessments were accepted by the defendant and, as we suppose, retained by it.

It is thus seen that he was constantly violating one of the chief laws of the order; that these violations were flagrant, open and notorious and fully and well known to the officers of the fraternity, and doubtless as well known to every one of its members living in or near Tiptonville. Notwithstanding these repeated violations of the laws of the order, no charges were ever preferred against him, but he was permitted to remain continuously a member in good standing of the fraternity, paying all of his dues and assessments promptly and died a member in good standing, from delirium tremens caused by the excessive and protracted use of intoxicating liquors. While thus violating the laws of the order, with the knowledge of its officers, its physician and probably most of its members, the camp was regularly, each and every month, collecting from him all of the assessments and dues owing by him to it, and the clerk of the camp was forwarding them to the Sovereign Clerk at Omaha, Nebraska.

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Learned counsel for Mrs. Howard frankly concede that he died from delirium tremens and that the constitution and laws of the order, as well as the application and policy issued to Howard, make such policy null and void when a member holding a certificate drinks intoxicating liquors to such an extent as to produce delirium tremens. But he insists that the Lodge and its officers and members were the general agents of the Sovereign Camp and waived the forfeiture of the certificate by receiving for a period of nearly six years the dues and assessments from Howard and sending them to the Sovereign Camp at Omaha. It is conceded that the camp had the lawful right to prefer charges against him for his drinking habit and to expel him, but that the camp chose not to do this, but continued him a member in good standing, collecting from him all lawful dues and assessments owing by him to it, sending the same to the Sovereign office, and continued this course of dealing with him for nearly six years, and in this way the camp waived the forfeiture provided for in the policy and in the constitution and certificate. It is further argued that the officers and the camp physician, and probably most of the members, knew of this drink habit of Howard when he applied for membership in the camp, and that when the committee passed upon his application the camp admitted him to membership with the full knowledge that he was in the habit of getting drunk to an extent that delirium tremens resulted, and thereby waived, as to him, these clauses in the constitution and the provisions in the policy making it void by reason of such excessive indulgence in intoxicating liquors.

It has long been settled in this State that a general agent of an old line fire or life insurance company may waive a forfeiture of a policy, notwithstanding the policy itself recites that its provisions cannot be waived except in writ-

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ing endorsed on it by an authorized agent. In 3 Baxter, 440, it was held by the Supreme Court that a local agent of a life insurance company, with power to take applications for policies, countersign the same, deliver them and collect first premiums and premiums for renewals, had authority under his commission to waive a forfeiture of a policy for a non-payment of the premiums. This case has been often followed in Tennessee and has now become the settled law of this State. Notwithstanding the policy recites that the agent has no authority to waive any of its provisions or conditions except in writing, the settled rule in Tennessee is now in favor of the authority and power of general agents to waive any conditions and provisions of a policy, and to make such waiver in parol, although the policy expressly provides such waiver cannot be made in parol: 8 Lea, 522; 9 Heisk., 261; 88 Tenn., 369; 11 Pick., 49; 110 Tenn., 726; 95 Tenn., 48; 6 Pick., 217; 125 Tenn., 676; 101 Tenn., 396.

It is also well settled not only in Tennessee, but in other jurisdictions, that forfeitures are not favored and that the policy of insurance is construed most strongly against the maker: 102 Tenn., 264; 110 Tenn., 720; 127 Tenn., 529.

In *Forrester v. Cunningham*, 127 Tenn., 529, Mr. Justice Lansden said: "Forfeitures are not favored and will not be enforced against equity and good conscience. This doctrine is firmly embedded in our jurisprudence as applies to stock companies, beyond dispute." He further states it is equally as well settled that an agent of an insurance company having ostensible, general authority to solicit applicants, make contracts for insurance and receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding the actual excess of authority.

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That policies are liberally construed in favor of the assured is settled in this State, as the following cases will show: 115 Tenn., 483; 117 Tenn., 33. There can be no doubt that it is well settled in this State by a long line of decisions, that the application, constitution and by-laws in force when the certificate is issued, or thereafter lawfully enacted, form or become a part of the contract and enter into it and become a part of it as fully as if copied into it in full if so provided in the application and policy: 117 Tenn., 549.

In 8 Lea, 520-521, the Supreme Court said that where an insurance contract is executed with full knowledge of an existing fact which would render it void, under a condition precedent embraced therein, the condition, or its breach, will be waived. This principle applies in this case to the fact that the officers, including the camp physician of this camp, knew, when this certificate was delivered to Howard, of his drinking habits and that he was accustomed to drinking to such an excess as to cause delirium tremens, and with full knowledge of such facts, they delivered to him the certificate and under this holding of the Supreme Court the conditions that avoided the policy because of the excessive drinking will be considered waived. We think that when this certificate was delivered to Howard, the officers of the camp then knowing his drinking habit and having full knowledge of the fact that such had been his habit before and was at the time, that the conditions in the certificate avoiding it because of such habit, were then and there waived by them and that the effect of it was to impliedly contract with him to take him as a member and to issue the certificate to him with such conditions waived, and, we think, there was an implied agreement to waive any forfeiture in the future if the drinking habit was persisted in by him while a member of the Order.

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That any condition that avoids a policy and forfeits the holder's rights thereunder may be waived in parol by a general agent of the company, or lodge, or fraternity, is well settled in this State, and has been ever since the case of *Insurance Company v. McCrea, Maury & Co.*, decided by Judge Cooper in an opinion reported in 8 Lea, 531. In that case Judge Cooper said: "A written contract may be changed by parol, and this although it stipulates that it shall be changed only in writing, for the obvious reason that men cannot tie their hands, or bind their wills, so as to disable them from making any contracts allowed by law and in any mode in which it may be entered into. A written bargain is of no higher legal effect than a parol one. Either may vary or discharge the other and there can be no more force in an agreement in writing, not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it. A parol permission may equally be given (although the terms of the policy requires the permission to be endorsed in writing on the policy) or a forfeiture may be waived by parol," citing a great many authorities to support the principle thus announced.

This rule was reannounced in *Life Insurance Co. v. Fallow*, 110 Tenn., 720. It was there said by Mr. Justice Neil: "It is well settled in this State that a general agent of an insurance company may waive conditions in the policy and that his company will be estopped to insist upon them in the enforcement of forfeitures, when such agent acts within the apparent scope of his employment as such agent of the company." Where there is a course of dealing between the assured and a general agent, in regard to the payment of premiums due by the assured to the company, such course of dealing may operate as an estoppel of a forfeiture arising out of a failure of the assured

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to pay premiums promptly at maturity. In the opinion by Mr. Justice Neil he says: "The law is equally well settled that insurers are estopped to insist upon forfeiture for non-payment of premiums when due, when, by any course of action, representation, or duties, the assured has been lead to believe that the forfeiture will not be insisted upon. Any agreement, declaration or course of action on the part of an insurance company, which leads a party honestly to believe that by conformity thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and should estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture."

This doctrine applies to the course of dealing between this camp and its member, Mr. Howard. The admitted facts in this case are that for a period of nearly six years, though he was repeatedly on drunken sprees and had for twenty times been treated for delirium tremens, yet the camp, month in and month out, collected from him his assessments and dues, thereby leading him to believe that his certificate would not be forfeited because of his drunken conduct and consequent delirium tremens. It would seem, if there ever was a case where the insurer should be estopped from enforcing a forfeiture, this is the case.

It is true that in many jurisdictions it is denied that the agent of the company has the right to waive forfeitures, and hold there can be no such thing as a waiver by any act of the agent, unless it is agreed to or ratified by the company, either directly or by a course of action known to it. But as said by Mr. Justice Neil: "In this State the rule has been given a larger scope and it has been held that a general agent may waive conditions in the policy and that

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the company will be thereby estopped to insist upon them in the enforcement of a forfeiture, when such agent acts within the apparent scope of his employment as agent of the company."

In *Insurance Company v. Hyde*, 101 Tenn., 396, the Supreme Court held that the insurer is estopped to claim forfeiture of a life policy for non-payment of dues, where it, through a long-continued and uniform course of dealing with the assured, had not exacted punctual payment of dues, but permitted the assured to pay on notice or demand and accepted such payment though made after maturity, without objection, provided the particular dues for non-payment of which forfeiture was claimed, were paid or tendered within a reasonable time after such notice or demand, or in reasonable conformity to such a course of dealing, citing 38 Iowa, 304; 33 Ohio State, 459; 96 U. S. R., 572, and other cases.

Whatever may be the rule in other States, as shown in the citations in learned counsel's brief from Cooley's *Briefs on the Law of Insurance*, the principle or rule embedded in the jurisprudence of Tennessee is that the policy of insurance cannot in any way bind the general agent of the company so that he cannot in parol waive any conditions that work a forfeiture. The policy may provide that no such waiver can be made by the agent except in writing indorsed on it, and yet it has been repeatedly held in this State, that the conditions may be waived by a general agent in parol, or by such course of conduct and dealing with the assured as to raise an implied waiver, or by such acts, conduct and circumstances as to impliedly waive the conditions and thereby operate to prevent a forfeiture for non-conformity to such conditions.

The last case in Tennessee bearing upon this question is that of *Forrester v. Cunningham*, 127 Tenn., 524. The

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certificate involved in that case was issued by a fraternity incorporated under the laws of the Dominion of Canada. The Deputy Supreme Ranger, who had headquarters at Nashville, Tenn., was invested with authority and power to initiate members into the Order, accept them as proper risks, subject to the ratification of the home office and with power to collect and remit to the order first and subsequent premiums due from the members to the Order. He had authority also to deliver to the member the policy or contract of insurance when he received it from the home office. Mr. Cunningham made application for membership into the Order, was examined by a physician for the Order and his report showed no evidences of any disease and thereupon Cunningham was accepted by the Deputy Ranger for insurance. Shortly after his examination, the assured took his bed and was confined there until some time in November, when he died of nephritis. The beneficiary certificate was not issued until the 6th of March, 1908, and not delivered until several days afterwards. The Deputy Ranger knew that Cunningham had Bright's disease before and when he delivered to him the beneficiary certificate. Other members of the lodge knew of his condition and visited him while he was sick. The Deputy Ranger visited him at least twice during his sickness. The opinion recites, that with full knowledge of the illness of Cunningham, the Deputy delivered the certificate to him and collected the dues or assessments under the rules and regulations of the Order until Cunningham's death. It appears that he was sick from the 20th of February, 1908, until some time in November thereafter, and during that time the Deputy Supreme Officer collected the dues and assessments regularly as they fell due and we apprehend remitted them to the home office in Canada. The constitution of the Order absolutely prohibited the delivery of

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the policy to the assured while in bad health, and yet the Supreme Court of Tennessee, speaking through Mr. Justice Lansden, held that the Order had through its local lodge officers and members waived that provision of the policy, and as authority for the rule the case of *Life Insurance Company v. Fallow*, *supra*, and *Murphy v. Insurance Co.*, 3 Baxter, 440, were cited to sustain the holding. The Court said: "It is well settled law in this State that a provision in the policy of insurance for a forfeiture of the contract for non-payment of the premiums is a material element of the contract, the violation of which will forfeit the contract unless the forfeiture has been waived. This being true, it would seem to follow logically that the acceptance of premiums by the insurer with full knowledge of the condition of the assured, would be a waiver of the claim of forfeiture growing out of his condition." In that case it was argued that these principles did not apply to benefit insurance companies; but the learned Justice held there was no reason why the rule should not apply to them the same as it did to stock insurance companies. He said: "This doctrine does not grow out of the original agreement of the parties, but is based upon the conduct and dealings of the parties with each other in respect of the particular matter in controversy. It affects the conscience of the party whose conduct has led the other to a course of dealing to his injury, so that he is not allowed to predicate his right upon a former agreement inconsistent with his course of conduct."

In the case under consideration we think the continued, regular course of dealing between this fraternity and Mr. Howard for nearly six years, should affect the conscience of this defendant and it should not now be allowed to predicate a right upon an agreement inconsistent with its long course of dealing and conduct with the assured. The

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learned Justice said: "The practical effect of such conduct was to make a new contract, the substance of which is that the Society agrees not to insist upon the forfeiture clause." That is what we think was done in this case when the camp received into full fellowship, as a member, Mr. Howard, with full knowledge that he was in the habit of getting drunk, which produced delirium tremens, and having so received him with such knowledge, such conduct operated to make a new and different contract with him, in which it was impliedly agreed not to insist upon the forfeiture clause in the certificate. Again, the learned Justice said: "If the officers and agents, acting within the real or apparent scope of their authority, passed by a rule or regulation intended to preserve mutuality and induced a member to act upon the assumption that the regulation is waived, and, he so acting, changes his condition for the worse, the principle of mutuality is waived, together with the regulation itself."

In *Forrester v. Cunningham*, the Supreme Court held that the officers and agents of the association might waive the provision for forfeiture and that the Deputy Ranger was such an agent of the society and that he acted for it and thereby waived the forfeiture by delivering the certificate and collecting the premiums while Cunningham was sick. It further held that the local organization and its officers whose duty it was to collect the premiums and remit them to the home office were the agents of the governing body and authorized to waive the forfeiture. The learned Judge said: "It was plainly the duty of Bogar, acting for the Society, to refuse to deliver the benefit certificate, if it was intended at any time to insist upon a forfeiture. Instead, however, he delivered it to Cunningham while he was in bed and the Society regularly assessed and collected the assessments due under the policy. The

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Society cannot be permitted to hold fast and loose with the contract. It cannot insist upon the contract for the purpose of collecting dues and appropriating them to its benefit and then deny it for the purpose of avoiding payment of the benefit certificate, or to lead the assured to believe that his contract with it was valid and that his certificate would be paid if he should die." The Court held in that case that it would be against equity and good conscience to enforce the forfeiture therein insisted upon.

In the case now under consideration, it would be equally against equity and good conscience to enforce the forfeiture which this fraternity insists upon. If the camp did not intend to pay the amount of its certificate to the widow of Mr. Howard, at his death, it was its duty to prefer charges against him and expel him from the Order on account of his persistent and repeated acts of drunkenness and consequent delirium tremens. Instead of doing so, the camp received his dues and assessments regularly as they became due, and lulled him into the belief that he was in fact, as well as in name, a member in good standing and that when his death should occur his widow would receive the benefits for which he was monthly paying the camp. To allow it now, after almost six years of such dealing with this man, to repudiate the claim of his widow and to insist upon enforcing the forfeiture because of his violations of the constitution and the conditions of the policy, would be a doctrine too monstrous for any Court to uphold, and this Court is unwilling to be a party to such monstrosity.

We have examined the case of *Modern Woodmen of America v. Breckinridge*, a decision by the Supreme Court of Kansas, and reported in 10 L. R. A. (N. S.), 136, and find it almost on all fours with the case at bar. The Supreme Court of Kansas decided that the local camp was

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the agent of the Sovereign Camp and that such agent had the authority to waive the performance of the conditions of the policy and to waive a forfeiture incurred by reason of a violation of the constitution of the fraternity and the conditions and provisions of the policy, and that Court held that where the subordinate lodge constantly collected from the member his dues and assessments, and its officers and members knew at the time that he was guilty of repeated acts of drunkenness to such an extent as to have delirium tremens, and where that was done for more than a year, the forfeiture provided for in the certificate was waived by this course of conduct and permitted the widow in that case to recover the full amount of the policy on which suit was brought.

A number of cases are cited from the decisions of the western States where this fraternal organization seems to have largely grown and taken a firm foothold, and all of the cases cited are in full accord with *Modern Woodmen v. Brickinridge*, and the holding of the Supreme Court of Kansas in that case. In the notes at the beginning of the opinion in that case, a great many cases from the western States cited by the commentator are commented on by him to some extent, and are in full accord with the rule announced in the main case. The commentator says: "It is a rule very generally followed by the cases that, where a member of a beneficial association violates some provision of the laws of the association and his subordinate lodge with full knowledge of the violation continues to recognize him as a member, a forfeiture incurred by such violation is waived by the acts of the subordinate lodge and the principal lodge is estopped from insisting upon the forfeiture." Again the commentator says: "In some cases the question has arisen as to the right of an association to treat the policy as void because of false statements in the application. where, with full knowledge of such false statements

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the subordinate lodge treated the applicant as a member." And the cases cited by the commentator all hold that in such a case, a forfeiture against such member for such violation will not be enforced.

We have gone more at length into the questions involved in this case than we expected when we began to write this opinion; but are so thoroughly satisfied of the position taken, that we thought it better to cite the authorities at hand in support of it. We have carefully examined all the cases cited by learned counsel for appellant and all the authorities mentioned in his brief to which we had access, and most of them were near us, but we have not found in any of them anything in contravention of the rule repeatedly announced by the Supreme Court of this State and in *Forrester v. Cunningham*, and stated so clearly by Mr. Justice Lansden. We feel no doubt of the liability of this fraternity for the amount for which this suit was instituted, and feel that it would be very unjust, and in fact an outrage to hold that this association can, after dealing with this man for nearly six years in the way stated, invoke and enforce the forfeiture provided for in the certificate issued to him when he became a member of the local camp. As stated, we cannot be a party to a scheme that works such iniquity and such a gross injustice upon an innocent person, as would be done if the forfeiture was enforced as this fraternity claims the right to do.

For the foregoing reasons we are content to affirm the judgment of the lower Court in all respects, with costs.

We have not overlooked the \$100 recovery for the monument. We think there is an unconditional promise to pay the \$100, and that this plaintiff is entitled to recover it, and to use it in erecting the monument over the grave of her deceased husband, and the judgment of the lower Court for the \$100 is also affirmed.

Frazier v. Auto Company.

E. J. FRAZIER v. BIDDLE AUTO COMPANY.

Affirmed by the Supreme Court, 1916.

1. **APPEALS FROM JUSTICES OF PEACE.** *Amendment or substitution of proper cost bond in Circuit Court.*

Where three defendants in a suit before the Justice of peace desired to appeal to the Circuit Court and executed bond with their own names signed as sureties, and where the Justice within two days from judgment accepted and approved the bond and immediately filed the papers in the Circuit Court, the appellant, notwithstanding the insufficiency of the alleged bond, may be permitted to file in the Circuit Court a new and sufficient cost bond so as to obviate dismissal for lack of such bond.

2. **SAME.** *Appeals to Court of Appeals. Jurisdiction of lower Court thereafter to accept compliance with certain conditions.*

Where the Circuit Court has granted an appellant ten days in which to file a new bond and where the case as against the appellee in the Circuit Court was ordered dismissed because he as plaintiff refused to execute prosecution bond, and where the latter has immediately prayed and perfected his appeal to the Court of Civil Appeals, the party appealing to the Circuit Court may, notwithstanding the appeal to this Court, comply with the order of the lower Court giving him ten days in which to file a Justice of the Peace appeal bond.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County.
VON A. HUFFAKER, Judge.

Frazier v. Auto Company.

WALTER ANDERSON for Plaintiff in Error.

L. D. SMITH and ROSCOE WORD for Defendants in Error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

On the 28th day of January, 1916, Frazier sued out a summons against J. B. Dooley, C. L. Dooley and J. C. Biddle, doing business as the Biddle Auto Company, in which summons Frazier set forth that the defendants were liable to him in damages for breach of a contract of sale of an automobile. This warrant was returned before Justice Dobson and the cause was set for trial on January 29. The controversy was heard by the Justice on the 31st day of January, 1916. The Justice gave judgment against the *defendant* for \$130 and costs. On the next day the Justice made an entry in the following language: "From which judgment the defendant prays an appeal which is granted to the next term of the Circuit Court upon their giving bond and otherwise complying with the law." The style under which the judgment and the granting of the appeal were entered was that of *E. J. Frazier v. Biddle Auto Company*. On the same day of the prayer for the appeal, the defendants tendered a so-called appeal bond in the name of Biddle Auto Company, J. B. and C. L. Dooley obligating themselves in the statutory amount to be void upon condition that the said auto company and Biddle and the Dooleys prosecute with effect an appeal which had been prayed and obtained. This bond was approved by the Justice, and the papers were on the succeeding day transmitted by him to the Circuit Court and marked filed as was the whole case, and it was regularly docketed as an appealed cause.

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On the 26th day of February succeeding the attorney for plaintiff moved to dismiss the appeal which had been attempted, upon the ground that no proper appeal bond had been filed. This motion was sustained and suit dismissed. Defendants thereupon moved to be allowed to file a proper appeal bond, which motion was overruled. A few days thereafter defendants renewed their motion to be allowed to file proper appeal bond. This permission was granted and defendants were given ten days in which to file the same. Upon a subsequent day the defendants moved the Court to require Frazier himself to execute a prosecution bond or otherwise comply with the law. This motion was sustained and Frazier was directed to comply. He declined so to do, with the result that the Court thereupon dismissed his suit and taxed him with the costs. He thereupon prayed for and was granted an appeal in error to this Court. His contention through able counsel is that the lower Court never at any time acquired jurisdiction of the matters in controversy because of the failure of the defendants to perfect their appeal from the Justice's judgment; and it is urged by Frazier that the Justice's judgment is and was undisturbed by anything which subsequently took place in the Circuit Court.

The real question presented is whether the Circuit Judge may allow an amendment of an appeal bond or the substitution of a new one instead of an old and defective obligation. Subsidiary questions are whether a bond without sureties is an obligation such as is absolutely void, and also whether an appeal granted upon an insufficient bond is any appeal whatever.

It is well to bear in mind the fact that the alleged bond was accepted and approved by the Justice and considered by him sufficient to transfer the case in regular order to the Circuit Court as an appealed controversy. Nor should

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we overlook the presumption of good faith and of intention to observe the law to which the appellants are entitled. We are bound to conclude that they deemed their obligation sufficient to transfer the cause and had no intention of causing delay or trifling with the judicial machinery. We should also keep in mind the fact that the Justice transmitted the record to the Circuit Court and treated the controversy as at an end so far as he was concerned. One other feature should be kept in view as a distinguishing aspect, and that is that the appeal was prayed, granted and perfected within the two days after judgment allowed by law. This, of course, upon the presumption that the so-called obligation was one of the means of perfecting the appeal. This fact renders unnecessary a critical review of many decisions in Tennessee bearing upon the question as to the power of a Justice with respect to the taking of an appeal bond after the expiration of two days. The Justice in the instant case did nothing with respect to the appeal after he had transmitted the papers to the higher Court; and no effort was made to have him do anything toward correcting any error or omission in the proceedings before him. So that the primary question is as to whether the document tendered by the defendants below was effectual to transfer the case to the Circuit Court. The next question is as to whether the so-called appeal bond was amendable in the higher tribunal.

Clearly one rule deducible from the authorities is that an appeal from the Justice must be prayed, granted and perfected within two days after the rendition of judgment: *Chapman v. Howard*, 3 Lea, 363; *Howard v. Long*, *idem*, 207; *Poindexter v. Cannon*, 2 Shannon's Cases, 290. All these cases make reference to the decision of *McCarver v. Jenkins*, 2 Heisk., 629, wherein it was held that with respect to the execution of bond the provision as to

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time was directory, and that a bond executed within a reasonable time was sufficient. We observed in an earlier part of this opinion that this feature was not vital for the reason that the denominated bond was in the instant case taken and approved by the Justice within two days. Hence, we are not called upon to determine absolutely whether the McCarver case is a discredited one. We do remark, however, that the decision is not emphatically repudiated by any of the adjudications which are seemingly adverse. If need be, many points of agreement between it and those decisions which seem to overrule it could be pointed out. But we repeat that with which we began this paragraph, namely, that some sort of obligation must be tendered to the Justice within two days in order to effectuate an appeal: Shannon's Code, 4872. This is a necessary deduction from the wording of the statute and from the numerous decisions of the Supreme Court since the McCarver case.

What efficacy did the bond in question have? It will be recalled that the defendants themselves were the obligors upon the instrument. In strict law there were no sureties and therefore no appeal bond: 3 C. J., 1136. But can such an obligation be pronounced absolutely void and totally ineffectual to transfer a case to the Circuit Court when it was tendered in good faith and accepted by the Justice and treated by him as efficacious? If absolutely void, if it had no operation whatever, then the Justice's judgment remained undisturbed. But if, on the other hand, it was treated as placing the cause in some way upon the docket of the higher Court, then it cannot be pronounced totally lacking in force. One test would be this: If Frazier had appeared in Court and not moved to dismiss, the defendants would have been entitled to their day in Court and to a hearing. Again, if Frazier had not

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appeared and judgment by default had been taken against him, we apprehend that the judgment of the Circuit Court would have been binding, he having knowledge of the appeal having been prayed, granted and the attempt made to perfect the same. For these reasons we decline to pronounce the obligation, although without sureties, to have been totally lacking in operation or effect. If not absolutely void, then the case was transmitted to the Circuit Court. Let it be granted that the appeal was vulnerable and subject to dismissal for defects. Our proposition is that in some way and for some purposes the cause was brought to the attention of the Circuit Court as a controversy which had been *appealed* to it. The bond was almost no obligation because sureties were lacking. But we are of opinion and so hold that it was such a defect, omission or insufficiency as can be amended when the defect or omission or insufficiency is pointed out and the parties given notice of that wherein their document is lacking. It is at such junctures that two statutes of our State come to the aid of *bona fide* litigants who have undertaken to appeal their controversies to the Circuit Court. It is provided by section 4595 of Shannon's Code that in all appeals from Justice of the Peace the Circuit Court shall supply any defect in the proceedings of the inferior Court, as though the suit had been commenced in the Circuit Court. The right of appellees to amend under this section can be arrived at by the simplest course of logic. There was an attempt to appeal. The defect was in the appeal or prosecution bond. There can be no doubt that any defect or omission in bonds or obligations can be supplied in all cases originating in the Circuit Courts. Then according to the statute in question the same right existed with respect to cases appealed from Justices. Section 5989 of Shannon's Code is in substance that no civil cause originat-

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ing before a Justice of the Peace and carried to a higher Court shall be dismissed by such Court for any informality whatever, and that such Court shall try the case on its merits. Here again is a statute upon which the action of the Court in allowing substitution of a new bond can be predicated.

But it is urged that the so-called appeal bond in this case is so totally lacking in essentials as not to be amendable. We have attempted to demonstrate the contrary by our efforts to show that the instrument was effectual to transfer the cause to the Circuit Court in some way. We find, passing beyond our own State for the time being, that the failure to have sureties upon an appeal bond is an insufficiency which may be corrected in the Appellate Court: 3 C. J., 1137. We find that our Court at an early day held that an insufficient bond or pauper oath for an appeal might be corrected in the higher Court: *Morris v. Smith*, 11 Humphrey, 133. Therefore if the omission of sureties renders an *accepted appeal bond* merely insufficient, this insufficiency can be corrected in this State without question.

And this is strictly in accordance with the principles that have given sanction to the amendment statutes which have been on our books since the State was erected. The policy of these statutes is to save every document, obligation or proceeding where the intention and good faith are manifest. In other words, parties are not to lose their rights because of omissions or misinformation where they stand ready at an opportune time to make good their defects and amend their ways, steps and documents. Now, in the instant case the parties intended to appeal. They failed to attach sureties, an omission which was likely in view of the style of the cause and nature of the suit. We see no reason why they should not be treated as having done

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that which they intended to do, namely, transfer the controversy from the lower to the higher Court for trial.

The rule in this State with respect to appeals from Circuit and Chancery Courts to the Supreme Court and to this tribunal is to allow the appellant to cure any defect in respect to appeal bond or pauper oath; and we never dismiss an appeal for an insufficient bond where the parties tender proper bond to this Court before termination of a case: *Jones v. Ducktown Co.*, 109 Tenn., 382, and cases there reviewed. See, also, *Wilson v. Corry*, 1 Lea, 390. The practice of allowing amendments to appeal bonds seems to be almost universal: 2 Ruling Case Law, 116; 3 C. J., 1186.

We are of opinion that the Circuit Judge did not err in allowing appellees to make a new bond. But it is urged that the bond was given after an appeal in the instant case was taken to this Court. This contention is not very meritorious although based upon a matter of fact. The only point of complaint is that the Court granted permission to file a new bond within ten days. The taking of an appeal immediately thereafter did not destroy the right of the appellees subsequently to comply with the order. Or if as a fact they should have filed a new bond earlier or if they were deprived of the right because of Frazier's appeal to take any steps in the cause, the order of the Court had the effect of placing the case upon the docket with the duty upon the part of Frazier to comply with the demand that he execute prosecution bond before proceeding to retry the case. Upon his refusal so to do, the order of dismissal necessarily followed, resulting in final termination of the case adversely to him.

We affirm the judgment of the Court in all respects and adjudge that Frazier pay all the costs.

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H. W. BENSON, ADM'R. v. HOWARD-PARK BRICK CO.

Affirmed by the Supreme Court, 1916.

PRIVATE PONDS. *Liability of owner for the drowning of child therein. No duty to guard.*

The owner of a private pond somewhat removed from a highway or public playground is under no obligation to inclose the pond so as to prevent injuries by trespassing children.

FROM HAMILTON COUNTY.

Appeal in error from the Circuit Court of Hamilton County. NATHAN BACHMAN, Judge.

M. M. WHITTAKER & FOUST for Plaintiff in Error.

TRIMBLE & MARTIN for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS is an appeal in error by H. W. Benson, administrator of Harry Benson, deceased, from a judgment rendered against him in the Circuit Court of Hamilton County, by which a motion for a directed verdict made by the Howard-Park Brick Company (defendant below) was sustained, and plaintiff in error's suit dismissed.

It appears that the defendant in error is the owner of a tract of land situated within the corporate limits of the city of Chattanooga, near the Tennessee River, upon which is located its brick plant, and in carrying on its brick manufacturing operations for a number of years it has exca-

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vated a considerable area of ground to a depth of several feet for the purpose of getting clay to be used by it in the manufacture of brick. This excavation lies near the bank of the Tennessee River, and when the Tennessee River is at flood stage, the water therefrom backs up into this excavation through a depression in the ground between it and the river and fills said excavation with water, thereby forming a pond several feet in depth. The water remains in said excavation at high stage until the high waters in the river recede, when it becomes practically empty again, or at such low stage that one can see the tramway located on the bottom of said excavation, which is used by the defendant in error in conveying dirt or clay from said excavation to the defendant in error's plant. The plant is located from 75 to 100 yards from the excavation, the tramway being situated in the rear of said plant, and leads from the plant into said excavation some distance.

This plant, at the time of the happening of the matters complained of in plaintiff in error's declaration, was being operated by the defendant, D. P. Montague, as its sole owner, under the name and style of the Howard-Park Brick Company.

In front of said brick plant runs the line of the Belt Railway Company, and from which a spur track extends from the main line to said brick plant. Twenty-fifth Street in the City of Chattanooga runs to the railroad track and from the end of Twenty-fifth Street there is a private roadway which crosses the railroad track and passes immediately between the brick plant and the office of the defendant in error through a gateway down to the excavation in question. This roadway is used by the defendant in error for its own private purposes. The neighborhood in the vicinity of said pond or excavation is pretty thickly populated, but no one lives between the railroad track and

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the pond. The excavation is plainly visible from the office of the defendant in error, which is situated from 75 to 100 yards away. Said pond, as it is referred to by the witnesses in the record, is enclosed by a fence, but the evidence tends to show that this fence on the side next to the railroad track, in places, is down, and a person can pass through the same without difficulty. The evidence further shows that the gate, situated between the railroad track and said excavation, sometimes stands open, and a person can pass through it without difficulty.

The evidence shows that in April, 1914, plaintiff in error's intestate, Harry Benson, a boy eleven years old, visited said excavation on a Sunday while the same was inundated with back water from the Tennessee River to a depth of several feet; in fact, the evidence shows that the water in said excavation, in places, was of the depth of sixteen feet. Plaintiff in error's intestate, upon reaching said excavation, pulled off his clothes, laid them on one of the tram cars situated on the tramway that led from the defendant in error's plant down into said excavation—that portion of said tramway located in said excavation being covered with water, for the purpose of going in swimming in said pond. He walked down the tramway some distance—stepped off into deep water, and was drowned. The present action was brought by his father (plaintiff in error), who qualified as his administrator, to recover for his death. His right of recovery is predicated upon the theory that said pond constituted an attractive nuisance, which was highly calculated to attract children of the age of plaintiff in error's intestate, who might desire to indulge in the childish sports of swimming, fishing, etc., therein; that said pond was dangerous, and defendant in error was guilty of negligence in not guarding the same against the visitation of children, and in leaving it unguarded, etc.

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The evidence does not conclusively show just how plaintiff in error's intestate reached said pond, but tends to show that he reached the same by approaching it from the rear, by going across other private property, and coming down the Tennessee River bank around to the tramway heretofore mentioned. The evidence further shows that there were several other boys about the age of plaintiff in error's intestate at this pond upon the occasion in question, and that two boys were swimming in the pond at the back side. Also that boys frequently visited this pond for the purpose of swimming, bathing and fishing therein, when the water was at suitable stage, and that this practice had continued for some seven or eight years prior to the accident in question, without objection upon the part of the owner of the premises.

It is insisted that the Court committed error in directing a verdict in favor of the Brick Company under the holding of the Supreme Court in the case of *Doyle v. Chattanooga*, reported in 128 Tenn., 433, and other cases cited in the brief of counsel for plaintiff in error applying the turntable doctrine.

We are of opinion that none of these cases are applicable to the case at bar. The case of *Doyle v. Chattanooga*, *supra*, was where the City of Chattanooga had permitted a dangerous pond to remain in one of the streets of the city, into which one of the small sons of Doyle fell, and another son, in attempting to rescue him, jumped into said pond, and both were drowned. The Court held that the pond was an attractive object to children—was dangerous, and was within the limits of a public street where children had a right to go, on invitation such as was impliedly given to the public at large; and that the city was guilty of negligence in permitting said dangerous pond to remain in the street, where it would be dangerous to the

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traveling public, who had been invited by its acceptance of said street, to travel the same. The other cases cited in brief of counsel for plaintiff in error are cases involving the turntable doctrine, which we think should not be extended to the case at bar, for the reason that the great weight of decisions, including the majority of those which recognize the doctrine of the turntable cases, deny the liability of a land owner for injury to trespassing children by reason of an open and unguarded pond or excavation upon his premises.

We will now proceed to cite a number of these cases which hold that a land owner is not liable for injuries to trespassing children by reason of an open and unguarded pond or excavation situated upon his premises, and many others could be cited to the same effect. We think that the conclusions in said cases, and the reasons upon which they are based are correct, and that in a case such as the one at bar it would be unjust to hold the land owner liable for the death of, or injury to, a child of the age of plaintiff in error's intestate upon the facts presented.

In *McCabe v. American Woolen Co.*, 124 Fed. Rep., 283, the Court sustained the demurrer, and held the declaration insufficient, where it appeared that the defendant maintained an unguarded mill trench, having precipitous banks, near the house of the father of the child, who fell in and was drowned. The Court, while recognizing the doctrine announced in the cases of *Sioux City, Etc. R. Co. v. Stout*, 17 Wall. (U. S.), 657, 21 U. S. (L. Ed.), 745, and *Union Pacific Railway Co. v. McDonald*, 152 U. S., 262, 38 U. S. (L. Ed.), 432, 14 U. S. Sup. Ct. Rep., 619, said:

"The case at bar, however, is essentially distinct in this particular. This canal was permanent, open, and plain to view—as much so as though it had been a natural stream

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—and suggests nothing whatever which would change the relations of the parties from what they would have been had it been a brook or a river. If the defendant is to be holden to this plaintiff for not especially guarding it, then the customs of the community must be changed throughout, because it is impossible to distinguish this canal, for the purpose of this case, from a river or a brook, a hay-mow, an ox cart left in a farmer's yard, a high ledge, or a field trench, about either of which children may happen to be accustomed to play. We think, therefore, that this canal was an object of such a character that, both from the reason of the thing and the customs of the community, the defendant was entitled to assume that the plaintiff's natural guardians would protect him from any dangers attached thereto, as they easily could and ought to have done. Therefore, on account of the various distinctions which we have pointed out, and the reasons which we have stated, this suit cannot be maintained."

Peters v. Bowman, 115 Cal., 345, 56 Am. St. Rep., 106, was a case where it appeared that the defendant permitted a pond to remain on his premises unguarded and unfenced. Children played upon it, and one of them, a boy of eleven, while floating on a raft, fell off and was drowned. The Court also recognized and approved the turntable cases, but said:

"A body of water, either standing as in ponds or lakes, or running as in rivers and creeks, or ebbing and flowing as on the shores of seas and bays, is a natural object incident to all countries which are not deserts. Such a body of water may be found in, or close to, nearly every city or town in the land; the danger of drowning in it is an apparent, open danger, the knowledge of which is common to all; and there is no just view consistent with recognized rights of property owners which would compel one

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owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall."

On a petition for a rehearing, it was said:

"A turntable is not only a danger specially created by the act of the owner, but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in nowise different from those natural ponds and streams which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. . . . A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot . . . would answer the purpose; and, therefore, to make it safe, it must either be filled or drained. . . . But ponds are always useful, and often necessary. . . . Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then, upon the same principle, must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches and falls out. But this, we imagine, is an absurdity for which no one would contend; and it proves that the rule of the turntable cases does not rest upon a principle so broad and of such rigid application as counsel supposes. The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the

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reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions."

To the same effect is the ruling in *Stendal v. Boyd*, 73 Minn., 53, 42 L. R. A., 288, 72 Am. St. Rep., 597, where the Court said:

"It is sought, however, to hold the defendant liable upon the facts stated, upon the principle of the turntable cases. . . . The doctrine of the turntable cases is an exception to the rule of non-liability of a land owner for accidents from visible causes to trespassers on his premises. If the exception is to be extended to this case, then the rule of non-liability as to trespassers must be abrogated as to children, and every owner of property must, at his peril, make his premises child-proof. If the owner must guard an artificial pond on his premises, so as to prevent injury to children who may be attracted to it, he must, on the same principle, guard a natural pond; and, if the latter, why not a brook or creek, for all water is equally alluring to children? If he must fence in his stone quarry after it fills with water, so that children cannot reach it—a well-nigh impossible task—why should he not be required to do it before, for a stone quarry, with its steep and irregular sides, might well be an attractive and dangerous place to children? It would seem that there is no middle ground, and that the doctrine of the turntable cases ought to be limited to cases of attractive and dangerous machinery. . . . We are of the opinion that the doctrine of the turntable cases ought not to be applied to this case. . . . With the exception of *Pekin v. McMahon*, 154 Ill., 141, 39 N. E. Rep., 484, the Courts of last resort, including those which recognize the doctrine of the turntable cases, have uniformly denied the liability of a land owner for injuries to trespassing children by reason of open and unguarded ponds and excavations upon his premises."

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In *Klix v. Nieman*, 68 Wis., 271, 60 Am. Rep., 854, 32 N. W. Rep., 223, the Court sustained a demurrer to the declaration, holding that the owner of a vacant lot in a city is under no obligation to fence in a pond on such lot in which surface water collects, and is not liable for the death of a child falling into it while at play on the lot. It was there said:

"If the defendant was bound to so fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability unless it was his duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole, or pond, or stream of water on his premises for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books, and it would be most unreasonable to so hold."

In *Moran v. Pullman Palace Car Co.*, 134 Mo., 641, 3; 3 L. R. A., 755; 56 Am. St. Rep., 543; 36 S. W. Rep., 659, the Court said:

"The graveman of plaintiff's action in substance is, that the pond was attractive to children, who were accustomed to bathe therein; that it was a dangerous place by reason of the deep hole therein; that defendant knew, or might have known, of the danger of the place to children, and that they were in the habit of bathing in the pond; that defendants negligently permitted the pond to be frequented by children, to remain unguarded and unfenced, neglected to fill said excavation and to fence the same, as required by divers ordinances which were pleaded, and such failure resulted in the death of plaintiff's son, who, entering the pond where it seemed to be shallow, fell over into the deep portion and was drowned."

In a later case, *Arnold v. St. Louis*, 152 Md., 183, 48 L. R. A., 291, 75 Am. St. Rep., 447, demurrers to a peti-

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tion were held properly sustained where the facts disclosed that plaintiff's intestates were drowned by falling through the ice. It was alleged that the pond was unguarded and unfenced, was near a public school, and was attractive to children, who were in the habit of skating on the pond, which fact was known to the defendants.

In *Peninsular Trust Co. v. Grand Rapids*, 131 Mich., 571, it was held that the City of Grand Rapids was not liable where a child of tender years wandered upon its premises, upon which its reservoir constituting a part of its waterworks system, was situated, through a hole in the fence enclosing the property, and was drowned in the reservoir, though the surroundings were such as to be especially attractive to children.

To the same effect is the case of *Ritz v. Wheeling*, 45 W. Va., 262, 53 L. R. A., 148.

In *Dobbins v. Missouri, Etc. R. Co.*, 91 Tex., 60, 38 L. R. A., 578, it was held that a railroad company was not liable where a child of tender years wandered upon its right of way and fell into a trench thereon and was drowned in the water accumulated in the trench.

In *Railway Co. v. Beavers*, 113 Ga., 298, 54 L. R. A., 314, it was held that one who makes an excavation upon his land is not bound to so guard it as to prevent injury to children coming thereon without his invitation express or implied, but who are induced to do so merely by the alluring attractiveness of such excavation and its surroundings.

To the same effect is the case of *Omaha v. Bowman*, 63 Neb., 333, 40 L. R. A., 531, where a boy seven years old was drowned by falling off a raft floating on a pond which had been made by the city in constructing and filling up a certain street.

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To the same effect is the case of *Ratte v. Dawson*, 50 Minn., 450, where a child of tender years was taken by an older sister, to whose care it was intrusted, to vacant residence lots in the city for recreation and pleasure, and was accidentally knocked down and killed by the caving in of an embankment caused by the excavation of sand, and which had been left unfenced. It was held that the land owner was not liable in damages, and that he owed no duty to persons coming upon the premises, without his invitation, to protect them from danger from the excavations thereon. The Court said:

“There is nothing to take the case out of the general rule that where the owner of land, in the exercise of his lawful dominion over it, makes an excavation thereon, so far from the street that a person coming on to the land without his invitation, would be a trespasser reaching it, such owner is not liable to an action for the injuries sustained.

In *Grindley v. McKechnie*, 163 Mass., 494, it was held that an owner who digs a deep hole on his unfenced land about 25 feet from the street, which fills with water, and is concealed by boards and shavings floating on the surface, is not liable in damages for the death of a five-year-old child, who, without the consent of the owner, goes on the land and is drowned in the hole.

To the same effect is *Gillespie v. McGowan*, 100 Pa. St., 144.

There are some cases holding a contrary doctrine to that announced in the cases herein cited, notably cases from Illinois and Kansas, but the great weight of authority is, that a private land owner is not liable for the death of, or injuries to a trespassing child on his premises by reason of an unguarded pond or excavation.

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In the case of *Union Pacific R. Co. v. McDonald*, 150 U. S., 262, 38 U. S. (L. Ed.), 344, which is also relied on by plaintiff in error to support his contention in the present case, was a case where the defendant had failed to fence in a slack pit kept upon its land, and the boy was burned by falling on and into it. The slack, on its surface, presented no sign of danger. It further appears that a statute required the defendant to put a fence around its slack pit. Under the circumstances of the case, which it is unnecessary for us to set out, the Court held that the boy was not a trespasser, and had not been guilty of contributory negligence. It may be seen, therefore, that that case is clearly distinguishable from the case at bar.

In the turntable cases cited and relied on by plaintiff in error, it was held that a turntable is a dangerous machine, and that a railroad company who maintains it unfastened is liable for injuries to a child, although such child be a trespasser, for the reason, that by the exercise of ordinary care upon the part of the railway company, and with little expense, the danger can be obviated. It is different, however, in a case of an open pond. It is well-nigh impossible to fence or guard a pond in such a way as to keep children—especially boys of the age of plaintiff in error's intestate, away from it. To do so, would necessitate the draining or filling of the pond, which, in many cases, would require a large expenditure of money, and would result in injury to the owner.

It results that we find no error in the judgment of the Court below, and it will be affirmed with costs.

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JAMES CRABTREE V. CONTINENTAL INSURANCE COMPANY.

Affirmed by the Supreme Court, 1916.

1. FIRE INSURANCE. Breach of condition against change of ownership. Executed but undelivered deed.

A fire insurance policy contained a provision making it void in case of change of ownership. The insured executed a formal deed of conveyance to another, but did not deliver the same absolutely, there being unadjusted some measurements and arrangements before the trade was finally to be consummated. During the pendency of these matters, the insured property was destroyed by fire. *Held*, that there had been no change of title and that the policy was collectible.

2. SAME. Proofs of loss. Waiver.

An insurance company waives formal proofs of loss by sending its adjuster to the premises and conferring with the owner as to the amount of loss and the origin of the fire.

FROM SCOTT COUNTY.

Appealed from the Chancery Court of Scott County.
A. H. ROBERTS, Chancellor.

J. C. J. WILLIAMS for Complainant.

STAPLES & SCOTT for Defendant.

MR. JUSTICE HALL delivered the opinion of the Court.

THE bill in this cause was filed to recover upon a fire insurance policy issued by the defendant on certain property belonging to complainant in May, 1909, for a term

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of five years, said property consisting of a dwelling house situated on complainant's farm near Winfield, in Scott County, Tennessee. The policy issued insured said property against loss by fire, and contained, among other conditions, the following:

"If any change other than by the death of the insured take place in the interest, title or possession of the subject of the insurance (except change of occupancy without increase of hazard) whether by legal process or upon or by the voluntary act of the insured, or otherwise, the same becomes inoperative and void."

Said policy contained the further provision:

"If fire occur the insured shall give immediate notice of any loss thereby, in writing, to this company, protect the property from further damage, and within sixty days after the fire (unless such time is extended in writing by this company) shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon; also any changes in the title, use, occupation, etc."

And the further provision:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of law or equity, until full compliance by the insured with all the foregoing requirements."

On May 15, 1914, just four days before the expiration of said policy, a fire occurred, which totally consumed the property covered by said policy. Of the loss by this fire the evidence shows that the company's agents at Nashville,

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Tennessee, were promptly notified, and on the second day of June, 1914, the defendant company sent its agent to the scene of the fire, and the loss was fully investigated by him, the evidence showing that the complainant met said agent and gave him all the facts within his knowledge pertaining to said fire and its origin. Said agent also took the affidavit of complainant with respect of the title and ownership of said property at the time of the loss. This agent made a report of his investigation to the company's general agents at Nashville, Messrs. Cooper & Hall, who wrote complainant a letter on June 17, 1914, stating that the defendant company could not pay the loss under said policy, for the reason that at the time of the fire the title to the property covered by said policy of insurance was not in complainant, but that an investigation having shown that the loss was an honest one, the company would pay complainant the sum of \$375 by way of compromise only. The letter expressly stating that the company did not admit liability on said policy. This proposition was refused by complainant, and the present suit was subsequently brought.

The defendant company answered complainant's bill, denying its liability upon said policy, and pleaded and relied upon the failure of the complainant to file with it or its agents notice or formal proofs of loss in writing, as required by the clause of the policy hereinbefore set out. The answer further averred that said policy was void and could not be enforced against defendant, because complainant had, prior to the fire which destroyed said property, parted with his title to the same in violation of the terms of said policy, by conveying the same to one R. S. Crabtree, without notice to the defendant, and was not, therefore, the owner of said property at the time of the fire.

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Upon a hearing of the cause upon the pleadings and proof, the Chancellor rendered a decree dismissing complainant's bill and taxing him with the costs of the cause, from which he has appealed to this Court, and has assigned errors.

The evidence shows that complainant, at the time of securing said policy of insurance, lived in the house destroyed, but on November 18, 1913, he removed from said property to Dayton, Tennessee, renting the property to his uncle, R. S. Crabtree, who moved into the dwelling house two or three days after complainant had vacated it, and was living in said house at the time of the fire.

Between the date of R. S. Crabtree's removal to the property and the date of the fire, to wit, February 18, 1914, complainant and his uncle, R. S. Crabtree, agreed upon an exchange of properties, and complainant executed to his uncle a deed, absolute on its face, conveying to him the land upon which said dwelling house was situated, and R. S. Crabtree and wife, in consideration for said conveyance, executed to complainant a deed of even date, conveying to him a tract of land situated in the same county some few miles from Winfield, Tennessee. The deeds to the respective parties were duly signed, acknowledged and delivered by the parties at the time of their execution, and the deed executed by complainant to R. S. Crabtree was burned in the fire which consumed the dwelling house covered by said policy, it having never been placed of record.

The undisputed evidence shows that at the time said deeds were executed and delivered there was a verbal agreement between complainant and his uncle that said deeds should not take effect, and the trade should not be complete until certain surveys should be made for the purpose of ascertaining the true boundaries and the exact number of acres in the R. S. Crabtree tract, and to locate and defi-

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nitely fix one of the lines of the tract to be conveyed by complainant to R. S. Crabtree, about which there was some dispute. It was a part of the agreement that the deeds, which were then executed, should not be placed of record; that when the surveys above mentioned should be made, and if the parties should be satisfied with them, they were then to execute and deliver new deeds and destroy the old ones. The surveys agreed upon were to be made as early as convenient, but had not been made at the time of the fire, which consumed the dwelling in May, 1914.

It was insisted by the insurance company that the execution of the deed by complainant to his uncle, R. S. Crabtree, conveying the land upon which said dwelling house was situated, violated the clause in the policy of insurance to the effect that if any change other than by the death of the insured should take place in the interest, title or possession of the subject matter of the insurance (except change of occupancy without increase of hazard) whether by legal process or upon or by the voluntary act of the insured, or otherwise, the same becomes inoperative and void, it being done without the consent of the insurer, and that such violation upon the part of the insured rendered said policy of insurance void. Upon the other hand, it is insisted that said conveyance was only conditional; never became effective, and the title to said property, therefore, never passed to R. S. Crabtree, but was in complainant at the time of the fire.

It has been held by our Supreme Court that a fire insurance policy is a personal contract for the indemnity of the insured, and does not go with the property on its sale as an incident thereto, in the absence of an agreement, or the transfer of the policy; and that where the policy provides that it shall be void if any change should take place in the interest, title or possession of the property insured,

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and the insured sells such property to others without a transfer of the policy and without any notice of a sale to the insurer, such sale forfeits the policy, and the purchaser cannot recover upon the same for a loss by fire. *Laundry Co. v. Insurance Co.*, 121 Tenn., 17; *Quarles v. Clayton*, 87 Tenn., 308; *Bennett v. Featherstone*, 110 Tenn., 27.

It is insisted by the defendant insurance company that the deed which was executed by complainant to his uncle, being absolute upon its face, took effect, notwithstanding the oral condition agreed on between the parties at the time of the delivery of said deed. In other words, it is the insistence of the defendant that said deed could not be delivered to the grantee as an escrow, and upon being delivered to the grantee, R. S. Crabtree, operated to convey the title to him, freed from any condition not expressed in the deed itself. To support this contention, defendant cites Mr. Devlin on Real Estate (3d Ed.), Vol. 1, Sec. 314, who announces the rule thus:

“A deed cannot be delivered to the grantee as an escrow. If it be delivered to him, it becomes an operative deed, freed from any condition not expressed in the deed itself, and it will vest the title in him, though this may not have been contemplated when the delivery was made and may be contrary to the intention of the parties. One of the grounds upon which this rule is based is that parol evidence is inadmissible to show that the deed was to take effect upon condition. ‘A deed,’ says Mr. Justice Harris, ‘can only be delivered as an escrow to a third person. If it be intended that it shall not take effect until some subsequent condition shall be performed, or some subsequent event shall happen, such condition must be inserted in the deed itself, or else it must be delivered to the grantee. Whether a deed has been delivered or not is a question of

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fact upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely or only upon the performance of some condition not expressed therein, cannot be determined by parol evidence.' ”

Also our own cases of *Brown v. Reynolds*, 5 Sneed, 639, and *Johnson v. Branch*, 11 Hum., 521.

We are of opinion that the rule announced by Mr. Devlin does not obtain at the present time in this State, though there is an expression to that effect in the two Tennessee cases above mentioned. We think, however, the rule announced by Mr. Devlin and the cases of *Brown v. Reynolds* and *Johnson v. Branch*, *supra*, has been materially modified by our Supreme Court in the more recent cases of *Alexander v. Wilkes*, 11 Lea, 225; *Majors v. McNeilly*, 7 Heisk., 294, and *Breeden v. Grigg*, 8 Bax., 163.

In the first of these cases the Court says:

“An escrow, as defined by the common law, is a written instrument delivered to a third person to take effect on the happening of a contingency. The term was originally applied to a deed, but has been extended first to sealed obligations, and then to written contracts generally. And it has been usually held that if the instrument be delivered into the manual possession of the grantee, it cannot operate as an escrow, though the parties may both have meant it should. It will, in such case, take effect discharged of the condition. This rule of the common law was recognized in *Johnson v. Branch*, 11 Hum., 521, and *Brown v. Reynolds*, 5 Sneed, 639. In the first of these cases, the delivery was by the surety to his principal to procure an additional surety named, not to the obligee. In the second case, the delivery was to the obligee to be handed to a third person to keep. In *Majors v. McNeilly*, 7 Heis., 294, the delivery of the notes was by the surety to the payee

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upon his agreement that they should not be operative until another surety was procured, and that he would hand them to the principal obligor to procure the other surety; but the payee, it seems, never did hand the notes to the principal. The surety was relieved in this case, as was the obligor in the preceding case cited. In *Breeden v. Grigg*, 8 Bax., 163, the delivery was by the makers of the note, directly to the payee, and upon a condition, the instrument being treated by the Court as an escrow, and the maker was relieved, even after judgment at law on the note, upon a bill in Chancery. The Court met the objection that the defense should have been made on the trial at law by saying that the remedy was not clear and unembarrassed at law."

Continuing the Court says:

"From this review of our decisions, it will be seen that the rigid rule of the common law has been modified in this State so as to give relief both at law and in equity although the delivery may have been directly to the payee or obligee."

We are of opinion, therefore, that the deed of complainant to R. S. Crabtree, in view of the verbal agreement between them, did not pass the title to said property to R. S. Crabtree, but the title still remained in the complainant until said condition should be performed, and was in him at the time of the fire. This being true, there was no forfeiture of the policy.

As to the second insistence of the defendant, which is to the effect that complainant forfeited his rights under said policy by his failure to file formal proofs of loss with the company within sixty days after the fire, as required in the second clause of the policy hereinbefore set out, it suffices to say that we think the company waived this con-

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dition of the policy. *Ligon v. Insurance Company*, 87 Tenn., 341; *Insurance Co. v. Norment*, 91 Tenn., 1.

The evidence shows that the company's agent or adjuster was sent to the scene of the fire; went upon the premises, and made a full investigation of the fire; the loss resulting therefrom, and the status of the title to the property. Complainant says that he met the company's agent, went over the facts pertaining to the fire with him fully, and gave him all the information in his possession concerning the same; and it appears that soon after this agent made this investigation defendant's general agents, Messrs. Cooper & Hall, wrote complainant the following letter:

"NASHVILLE, TENN., June 17, 1914.

"JAMES CRABTREE, *Esq.*,

"Dayton, Tenn.

"DEAR SIR: We took up with the Chicago office last week the question of any loss sustained under National No. 781354, issued to you by the National Insurance Company through its Huntsville agency, and under your sworn statement we beg to advise you that the title to this property had passed from you to your uncle, Horace Crabtree, by deed, and inasmuch as you were no longer owner of the property insured, the National does not feel that it should be held responsible under said policy.

"However, investigation having shown that the loss was an honest one, we are willing to pay you the sum of \$375, purely, however, in the nature of a compromise settlement, and not admitting any liability on the part of the company.

"We are authorized to make you this proposition, and will be glad to have you advise us whether or not you care to accept same.

Yours very truly,

"COOPER & HALL, *State Agents.*"

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This letter stated that an investigation had been made, which showed the loss to be an honest one, but payment of the policy in full was refused upon the ground that the investigation showed that complainant was not the owner of the property at the time of the fire. It appears that no formal proofs of loss were ever demanded by the company, and it cannot now rely upon the complainant's failure to furnish them, in view of the facts above stated.

It results that we are of opinion that the complainant is entitled to a decree for the full amount of said policy, to wit, \$750, which, the proof shows, is less than his actual loss, with interest from July 15, 1914, and a decree will be entered here accordingly.

The defendant will pay the costs accruing in this Court and in the Court below.

Lampley v. Fain.

J. E. LAMPLEY v. EARL M. FAIN.

Writ of certiorari denied by the Supreme Court, 1916.

AUTOMOBILE OWNERS. *Not liable for injuries inflicted by chauffeur while the latter is operating a machine wholly for his own purposes.*

AN owner of an automobile cannot be held liable for injuries received by a pedestrian because of collision with an automobile operated by his chauffeur at the time for his own purposes and without the knowledge and acquiescence of the owner.

FROM DAVIDSON COUNTY.

Appeal in error from the Circuit Court of Davidson County. THOS. E. MATTHEWS, Judge.

J. W. PUCKETT for Plaintiff in Error.

HUME & CORNELIUS for Defendant in Error.

MR. JUSTICE HALL delivered the opinion of the Court.

THIS suit was brought by the plaintiff in error in the Court below against Earl M. Fain to recover damages for personal injuries growing out of an automobile accident on the Harding Pike, near Nashville, Tennessee.

At the conclusion of the evidence in the case, defendant in error (defendant below) moved the Court to direct a verdict in his favor, which motion was sustained, and plaintiff in error's suit was dismissed. From the judgment of dismissal he has appealed to this Court, and has assigned errors.

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While the assignments are several in number, they all go to the same question, and that is, that the Court erred in directing a verdict in favor of the defendant below upon his motion made at the close of all the evidence in the case.

The undisputed evidence shows that on February 15, 1915, the defendant in error's automobile, while being driven by the colored chauffeur of Mrs. Myer Cohen on the Harding Pike, near the City of Nashville, Tennessee, collided with the wagon of plaintiff in error, in which he and his companion were riding, overturning the same, throwing the plaintiff in error out, on account of which he sustained painful injuries.

The defendant in error operated a billiard hall in the City of Nashville, which he leased from Mrs. Cohen and her husband, who lived upstairs over said hall. Mrs. Cohen kept an automobile and a colored chauffeur. Her automobile had been sent to the shop to be repainted. While her car was thus in the shop she arranged with the defendant in error to let her use his automobile twice a week in going to market, and agreed that defendant in error might keep his automobile in her garage, which was located in the rear of the premises, where defendant in error did business, during the time her automobile was in the shop. Defendant in error had formerly kept his automobile in the garage of the Tennessee Auto Company. It was agreed and understood between the defendant in error and Mrs. Cohen that she was to keep the automobile under lock and key, and not let it go out, except when she or her husband were with it.

On the afternoon of the accident the colored chauffeur went to Mrs. Cohen's room—secured the key to the garage, and with another colored man, took the car out, and was driving the same on the Harding Pike when the collision occurred. The car was taken out of the garage by the col-

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ored chauffeur of Mrs. Cohen without her knowledge or that of the defendant in error, and he was operating it for his own pleasure at the time, and not in the interest of his employer, Mrs. Cohen. The evidence shows that the ratchet of the hand brake was worn, and on the morning of the accident defendant in error sent word to Mrs. Cohen's chauffeur, Zach Edwards, to repair said ratchet by filing a notch in it so that the lever of the brake would hold when set up, but the undisputed evidence is that he did not authorize the chauffeur to take the machine out of the garage for this purpose, and that it was not necessary to do so in order to repair the ratchet. It is not claimed by the chauffeur that he was operating the car for the purpose of testing the ratchet at the time of the collision. He admitted that he took the car out of the garage without the consent of either Mrs. Cohen or the defendant in error.

We are of the opinion that the trial Judge was correct in directing a verdict in favor of the defendant below. Under the undisputed facts, we are of the opinion that no relation of master and servant existed between the defendant in error and the colored chauffeur, Zach Edwards. In the operation of the automobile, Edwards did not represent the defendant in error, but was operating it for his own pleasure, and without the defendant in error's consent or knowledge.

The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the injury. *Goodman v. Wilson*, 129 Tenn., 464.

"The owner of an automobile is not liable to one who is injured by the negligence of his chauffeur while operating the machine without his knowledge or permission, and for a purpose other than that for which he was employed,

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as where the driver is on an errand personal to himself, or is making a detour for his own purposes; and if a chauffeur takes out his master's automobile in violation of instructions that it must not be taken out without the express orders of himself or his wife, the owner may be relieved from liability in the event of the occurrence of an accident." Ruling Case Law, Vol. 2, Sec. 33, page 34; *Fleischner v. Durgin*, 207 Mass., 345, 20 Am. Cas., 1291, 33 L. R. A. (N. S.), 79, and note; *Riley v. Roach*, 168 Mich., 294, 37 L. R. A. (N. S.), 834, and note; *Moon v. Matthews*, 227 Pa. St., 488, 29 L. R. A. (N. S.), 856.

The fact that the defendant in error admitted to a friend of plaintiff in error, after the accident, that he was the owner of the machine, and expressed a willingness to meet plaintiff in error on the morning following the accident at a drug store in Nashville, and discuss the matter with him with a view of reaching a compromise, is immaterial in view of the undisputed evidence that the colored chauffeur was operating the car without the consent of the defendant in error, and not in the prosecution of the defendant in error's business.

Evidence was offered by the plaintiff below tending to show that after the accident, upon defendant in error being called over the telephone by J. R. Cook (proprietor of the Broadway Drug Company), at the instance of plaintiff below, he stated that the automobile belonged to him and requested to arrange with the plaintiff to meet him the next morning at the Broadway Drug Company's place of business for the purpose of discussing a compromise with the plaintiff.

This evidence was incompetent, and would, no doubt, have been excluded by the Court, if exception had been taken to it at the time it was offered. In view of the undisputed evidence that the automobile was being operated

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by the colored chauffeur without the consent of defendant in error, and for his own pleasure or purposes, it is rendered immaterial in the determination of the question of whether or not the case should have been submitted to the jury.

The judgment is affirmed with costs.

J. M. ROBINSON-NORTON COMPANY v. T. H.
HARRIS, ET AL.

Writ of certiorari denied by the Supreme Court, 1916.

1. **GENERAL ASSIGNMENT.** *Instruments purporting to be. Invalidity.*

An instrument purporting to be a general assignment is absolutely void unless accompanied by the sworn schedule provided by Act of 1881.

2. **SAME.** *Rights of creditors against vendees of the Trustee.*

The general creditors of the maker of such an assignment may bring attachment against the goods in the hands of the vendees of the trustee or may hold them personally liable for the value thereof.

3. **SAME.** *Purchases from trustee chargeable with notice.*

Purchasers from such trustee are chargeable with notice of the latter's defective title.

4. **SAME.** *Fraudulent conveyance. Acquiescence.*

Such conveyances are to be treated as fraudulent, and the fraud may be waived. But delay of six weeks, during which time complainants were investigating their rights, would not afford sufficient time for ratification.

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5. ATTACHMENT. *Damages for suing out.*

There can be no recovery of damages occasioned by the suing out or levying of an attachment where complainant had legal grounds for the writ.

FROM DICKSON COUNTY.

Appealed from the Chancery Court of Dickson County,
J. T. STOUT, Chancellor.

H. M. LEECH AND LEECH & LEECH, for appellants.

LOUIS LEFTWICH, for appellees.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

In the summer of 1913 defendant Harris was a merchant at Dickson. Becoming financially embarrassed, he undertook on the 23rd of July to make a general assignment to defendant R. M. Leech for the benefit of all his creditors. The effort was to convey to the trustee all of the merchandise, furniture and books of accounts owned by Harris at the time. The instrument was immediately registered, and on the same day Mr. Leech as assignee sold to defendants Hutton and Mrs. Addie Hunt the property assigned at fifty per cent. of the invoice. The amount thus ascertained aggregated some thirty-five hundred dollars, which was paid in cash. On the same day the trustee prepared a pro rata sheet and transmitted to the respective creditors of Harris their proportion of the trust fund. Complainants, four of his creditors, declined to retain the check or to accept the trust, and on the 6th day of September following filed their original attach-

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ment bill against Messrs. Leech and Harris and Mr. Hutton and Mrs. Hunt, and had the goods or a considerable portion of them attached.

The bill was filed upon the theory that the deed of trust was fraudulent in law and in fact and also that it was absolutely void because it purported to be a general assignment and yet was not drafted nor executed as the law prescribes. It was also assailed as void because of defective acknowledgment and for insufficient description. There was likewise the charge that the whole arrangement was a scheme devised for the purpose of evading the Bulk Sales Act, thereby enabling Hutton and Mrs. Hunt to become the purchasers of the stock immediately and without giving notice to creditors.

Pleas in abatement to the attachment and also elaborate answers were filed by the defendant. A receiver for the goods was appointed soon after the filing of the bill, but his services were dispensed with or at least he was excused from making sale upon the execution by Hutton and Mrs. Hunt of a bond conditioned to pay such debts as the Chancery Court might adjudge were due complainants at final hearing. Upon this being done the purchasers were restored to possession of the goods.

These purchasers also asked that their answer be treated as a cross bill for the purpose of recovering damages from complainant occasioned by the wrongful serving of the attachment and detention of the goods from them.

At the hearing the Chancellor decided that the four complainants, namely Robinson & Company, Harris Solinsky & Company, Julian Kokange Co., Tinsley Millinery Company, were entitled to a recovery of their respective sums with interest, less a credit of forty-five per cent. of the amount held by Trustee Leech for their benefit. This latter sum was in the hands of Mr. Leech at the time of

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the decree and was paid into the Court by him cheerfully, and to this part of the decree there was no exception and no appeal. The Chancellor proceeded to adjudge that complainants named recover of defendants Harris, Hutton and Mrs. Hunt, principals, and their sureties on their replevin bond the respective sums due them, aggregating after deduction, \$413.69, and the costs. From this decree Hutton and Mrs. Hunt prayed and perfected their appeal and are here assigning numerous errors.

We hardly think it necessary to treat separately of the eight assignments of error, as we can touch upon all of them by conjoint discussion. We have given this case a great deal of examination and thought. The learning and skill manifested challenged our attention, and this was reinforced by the emphasis placed upon what is urged to have been wrongful treatment of appellants. Notwithstanding all of this, we feel constrained to the conclusion that learned counsel for complainants was within his legal and equitable rights in pursuing his remedies and that the decree of the Chancellor is justified by the law and the evidence.

It will be recalled that the purchasers of the goods executed a bond such as substituted their personal liability in lieu of the goods in case complainants were held entitled to recovery; and if complainants had the right to maintain their attachment and secure decree for their debts a personal judgment against the seller and the purchasers was the proper thing.

We are of opinion that the instrument which Harris undertook to execute was intended as a general assignment under the Acts of 1881, and that this intention was manifested by its phraseology. At all events, everyone concerned with it interpreted it as a general assignment and we must so treat it in applying the legal test: *Bank v.*

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Noe, 86 Tenn., 21. Tested by these rules the instrument must be pronounced absolutely void; and this conclusion is unavoidable. There was no accompanying schedule describing the property and verified by oath as prescribed by the act. This omission was fatal. *Bank v. Noe*, *supra*, *Steedman v. Dobbins*, 9 Pick., 402; *Fertilizer Co. v. Thomas*, 13 Pick., 482. Again, while not making it the basis of our decision, we shall remark that the description of the property should have been a little more particular. In addition, the acknowledgment is defective in that it is without date, and it fails to contain the recital that the bargainor had acknowledged its execution for the purposes therein contained.

The real question presented is as to the legal or equitable rights of creditors of the assignor when an instrument is void because of the omission of something required by statute. In other words, what remedies are open to creditors when an instrument is void in law and not void in fact? We pause at this juncture to state that we are of opinion that neither Mr. Leech nor Mr. Harris nor the purchasers of the goods were moved by an actual intent to defraud creditors. We are convinced that Harris did what he deemed was his legal right, namely, make a general assignment for the benefit of all of his creditors, and that Mr. Leech thought that he had the right to sell the goods on the same day of his qualification and execution of bond in bulk and by private sale; and we are persuaded that he received their market value from the purchasers and proceeded to distribute the trust funds among the creditors, less his expenses and commission. But the best of intentions can not overcome that which the law expressly says is constructively fraudulent.

It is earnestly contended by able counsel that in the absence of actual fraud creditors can proceed to attach the

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goods in a Court of equity only, and that when they resort to this tribunal the creditors may be repelled if guilty of laches, or have acquiesced in the fraud. It is really unnecessary for us to make a distinction between legal and equitable procedure in the case at bar, for the reason that we have reached the conclusion that complainants by delaying the institution of their suit some six weeks after the transfer did not lose either their legal or equitable right to hold the purchasers to the extent of the value of the goods. In other words, if the instrument which was a necessary chain in the title of the purchasers was absolutely void and did not bring about a change of ownership from the assignor to the assignee, there was no necessity of instant action by the creditors against the purchasers. Hutton and Mrs. Hunt knew both as a fact and as a matter of law that Harris had not succeeded in transferring his goods to Leech. Hence the purchase from Leech was in law ineffectual to change the title: 2 Rul. Case Law, 680-81. As a consequence they held the goods as constructive trustees of the creditors of Harris and were subject to suit personally or the creditor might proceed to attach the goods. *Daly v. Drug Co.*, 19 Cates, 402. The ingenious argument of counsel for appellants is that complainants were informed on July 24th of the transaction and of the sale to the defendant publishers and were also made aware of the situation and of defects of title, and also knew that the purchasers were proceeding in business and were buying new stock. It is plausibly argued that six weeks delay repelled them because it was their duty to disaffirm at once and bring their suit. As we before intimated, if it be conceded that the rule of laches and acquiescence be applicable, we are unable to say that these complainant creditors with their small claims and some of them non-residents did not act with reasonable

promptness. In the first place the situation suggested much inquiry and conferring with and among creditors. It also required an examination to ascertain the value of the goods. This required time. Again complainants must be repelled if at all upon the doctrine of estoppel; and this never applies for parties who are not innocent, nor ever to parties who do not legally suffer because of postponement; *Parker v. Hotel Co.*, 12 Pick., 286. Every case must turn largely upon its own facts: *Pearson v. Hotel Co.*, 3 *Thompson*, 606; and it is hard to conceive of a case where six weeks delay in pursuing parties who are not in law innocent purchasers and who might for several years be held personally liable can be said to be prejudiced by a delay of six weeks.

It is earnestly insisted that there can be no personal liability upon the part of purchasers when an instrument is void in law. We are of opinion that the contrary of this proposition is established by the preceding decisions herein cited and by numerous other cases. In fact the reasoning of the Court in *Solinsky v. Bank*, 1 Pick., 368, wherein it was held that a fraudulent vendee might be personally sued, was just as applicable to vendees from trustees holding under void instruments as in cases of actual fraud.

If right in our conclusion that an attachment was justified and authorized, as it seems to have been by the decisions treating of general assignments, then there could be no recovery of damages on the part of the purchasers and the Chancellor was not in error in so deciding.

What we have said disposes specifically of the subject of assignments 1, 2, 3, 4, 5, 6, 7 and 8. We have discovered no sufficient legal warrant for decreeing a different result. It is somewhat anomalous that creditors attacking an assignment are allowed by the Chancellor to participate in the trust fund; but as pointed out be-

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fore, Mr. Leech did not object to this part of the decree, nor do we find this action of the Chancellor to be assailed by appellants. Hutton and Mrs. Hunt will be taxed with the cost of this appeal along with the sureties upon their appeal. The costs of the lower Court will be paid as they were adjudged by the Chancellor.

LEE HORN, ADMR., v. LAURA MAY SHELTON.

Affirmed by the Supreme Court, 1916.

1. *MARRIAGE. Invalid where formalities required by statute absent.*

A marriage contracted without bond and license and a duly authorized official as prescribed by our statute is void.

2. *SAME. Estoppel upon parties or their privies to deny validity of a marriage. Estoppel not available where illegality well known.*

While in some cases the husband or the wife and possibly their privies may be held estopped to question the validity of a marriage, an estoppel will not avail where the union was affected meretriciously, and with full knowledge of its illegality and impropriety.

3. *SAME. Compensation for services. Denied woman in such case.*

A woman who has lived with a man for some years as his mistress, although claiming with his consent to be his wife, is not entitled to compensation out of the estate of the man for services rendered during their relation.

FROM UNICOI COUNTY.

Appeal from the Chancery Court of Unicoi County,
HAL H. HAYNES, Chancellor.

Horn v. Shelton.

THAD A. COX AND BEN H. TAYLOR, for complainants.

JAS. B. COX, for defendant.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

Lee Horn and others, children and heirs at law of one Frank Horn, filed their original bill against Laura May Shelton for the purpose of securing a decree that she was not the lawful wife of their deceased father and not entitled to homestead and dower and other rights as his widow. It was alleged that she was in possession of certain real estate claiming it as homestead, and an injunction against her assertion of any right to the title and possession was sought. The Shelton woman filed an answer and cross bill. Her averments were in substance that she was the lawful wife and at the time of the filing of the bill the lawful widow of Frank Horn and entitled to all rights as such; she also alleged that Horn and she had been lawfully married in 1911 and had lived together as man and wife until the death of the husband in 1915, that she and Frank Horn treated each other as husband and wife and each held the other out as such, and that in consequence she acquired the rights of a wife notwithstanding irregularity in the marriage. She also averred that she had been a faithful wife, hand and servant to Frank Horn for four years preceding his death and up to the time of his decease, and had rendered valuable assistance, service and aid in improving his real estate and making a living. Her prayer was that she be adjudged the lawful widow of Frank Horn or held entitled to such rights, or that she be allowed reasonable compensation for her services to him if she should fail in securing the rights of a widow.

The Chancellor held that the marriage was illegal, and further held that she was not entitled to the rights of a

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widow upon the doctrine of estoppel; and he also decreed that she had been fully compensated for her aid and services to Frank Horn if she was entitled to remuneration. In consequence he dismissed her cross bill and sustained the original bill. She has appealed and assigned errors.

We concur with the Chancellor in his conclusion that there was no valid marriage between Frank Horn and the cross complainant. ✓ It was satisfactorily shown that no license was ever issued and recorded as required by the law. There is no attempt to show that any bond was ever given or that any of the formalities required were complied with other than an effort to show that Horn had produced a marriage certificate which he claimed was issued by one Sams, a former deputy County Court Clerk. We do not think in the first place that any certificate was ever issued, or if so that it was prepared by anyone authorized to perform this official act. The marriage was therefore void under the laws of this state: ✓ *Smith v. Bank*, 7 Cates 15.

But it is next contended that the Chancellor should have held that Frank Horn would have been estopped to question the marriage had he been living, and that as he was estopped the same rule would operate against his privies in estate. This is a question that has given us some concern. But we have reached the conclusion that appellant is not in position to invoke the doctrine of estoppel and that the Chancellor was not in error in repelling her. We are of this opinion notwithstanding the very cogent language of *Smith v. Bank, supra*, bottomed as it is upon the early case of *Johnson v. Johnson*, 1 Cold., 626. We can readily conceive of cases where the survivor of an alleged marriage can insist that the heirs of the other be restrained from disputing the validity of the arrangement, just as neither party can deny the marriage during

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their joint lives. But the use of the doctrine of estoppel in these cases is not different from its application to other situations; and if so the pertinency of the doctrine must be determined by reference to the principles and the purposes of this rule of equity. For instance, it is available to shield the innocent and to prevent imposition upon the confiding and to protect the unwary from the designs or conduct of others. It can ever be made available for the wicked, the wise or designing.

We are of opinion that estoppel can never be resorted to in the case of a void marriage where the illegality of the marriage is known to the party insisting upon the estoppel and where there is no pretense of deception upon the part of the other partner to the arrangement. We do not believe that Courts of equity should even for civil purposes and property rights invoke this shielding doctrine where neither good faith nor lack of knowledge nor honest belief in the validity of the marriage, nor a bona fide effort to comply with the laws of the land and the dictates of morality are present as considerations. We think this is the doctrine of the case of *Johnson v. Johnson, supra*; and it is certainly the rule obtaining in other jurisdictions: (26 Cyc., 867. 0

We find as a fact that Frank Horn and this woman had sustained an illicit relation for some four years before the death of his wife, and that their liason was notorious, and especially that it was known to the family of Horn. We also find that immediately after the death of his wife Horn took up his abode at the house of this woman and lived with her in lewdness until the alleged marriage in April 1911. We are of opinion that she as well as Horn knew that the so-called marriage at that time was illegal, not possessing any element of genuine marriage other than a ceremony by a Justice of the Peace. We are driven to

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these conclusions after a critical examination of the testimony. The wife of John Sams informed Frank Horn in the presence of this woman that her husband was not authorized to issue marriage licenses. These two people were likewise informed by a brother of John Sams that the latter had ceased to act as deputy Clerk. It is shown that Horn made an effort to reach one Willis, several miles away, for the purpose of ascertaining whether he could issue licenses. Whatever his intentions, whether good or bad, we can reach no other conclusion than that he and the woman abandoned the effort to have a legal marriage performed and returned home after some sort of ceremony totally lacking in validity. There is not any testimony whatever upon which this woman can urge that she was misled by Horn and honestly believed that she was married and remained his wife until his death upon the assumption in good faith that she was lawfully married. The reverse is the truth. Hence the lack of any basis for an estoppel. The general rule is that no estoppel against a palpably illegal marriage ever arises, either on the part of the parties or of the heirs of either: 26 Cyc., 867. Nor is there any estoppel created by the designation of the woman as his wife by the so-called husband in his will, as is contended in this case; nor is there any ground for estoppel by the execution of deeds and allotment of widow's rights to personalty: *Idem*.

We are persuaded that it would not be good morals to sanction such an arrangement, or treat it as the basis for the acquisition of rights by parties *inter ses*. For we are not dealing with the rights of third parties against the one or the other upon the assumption that there was a marriage.

It is next urged that the Chancellor should have given this woman something by way of compensation. We agree

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with the Chancellor that this claim is without merit. In the first place she was cared for by Frank Horn munificently before his wife died and was well provided for after his alleged marriage to her, in addition to all of which he had paid for a parcel of land the title of which was in her. Moreover, we are of opinion that she should be repelled upon the equitable rule that she does not possess clean hands. The preponderance of authority is that a party to an illicit relation created by a void marriage cannot recover for services; (See note *Emerson v. Botkin*, 29, L. R. A. (N. S.,) 788.) ✓

It is also assigned as error that the Court admitted considerable testimony to the effect that the character of Laura May Shelton was bad, both upon the subject of truth and that of chastity. ✓ Our first observation is that the assignment of error is bad because it does not embrace the substance of the testimony objected to (*Gorrell v. Newport*, 1 Chy. App., 120. In the next place we are of opinion that the evidence was competent. It was entirely proper to show that her reputation for untruthfulness was bad, she having been a witness in her own behalf. We are also persuaded that testimony with respect to her unchastity was pertinent to the many contentions urged by complainants.

We overrule all assignments of error and affirm the decree of the Chancellor with costs.

Copper Company v. Simpson.

TENNESSEE COPPER COMPANY V. REGINA SIMPSON.

Affirmed by the Supreme Court, 1915.

1. PEREMPTORY INSTRUCTIONS BASED UPON EVIDENCE OF DEFENDANT.

Where a defendant establishes by incontrovertible proof a fact which disentitles plaintiff to a recovery, the Court should direct a verdict, notwithstanding the rule that when motion therefor is made all presumptions must be indulged in favor of the plaintiff.

2. MASTER AND SERVANT. *Necessity of showing negligence or blameable conduct.*

There can at this time be no recovery in this State by an injured servant against his master without showing that the master is guilty of some blameable conduct directly and proximately producing the injuries.

3. SAME. *Reliance by master upon observance of customary methods.*

A master has the right to assume that his servant will perform his duties in the customary way and that he will particularly follow a course for a long time observed by his fellow workmen.

4. SAME. *Placing of responsibility of notification of danger upon a servant.*

Where the master sets his servant to work in a place that is constantly changing and where new or recurrent dangers may appear, the master may onerate the servant with the duty of giving the superintendent notice of such danger, or in case of failure to assume himself the risk of the situation. And when in such case the servant elects to assume the hazards instead of notifying his principal and is injured, there can be no recovery.

FROM POLK COUNTY.

Appeal in error from Circuit Court of Polk County,
SAM C. BROWN, Judge.

Copper Company v. Simpson.

CORNICK, FRANZ, McCONNELL & SEYMOUR, AND GORDON HYATT, for plaintiff in error.

MAYFIELD & MAYFIELD, for defendant in error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

THIS action was brought by Mrs. Simpson as the widow of one Simpson to recover for his alleged wrongful killing while in the service of the Copper Company as a miner. There was a verdict for \$5,000.00, followed by judgment therefor. The Company excepted and perfected its appeal and is here assigning errors.

The first and second assignments of errors are in substance that there is no evidence to sustain the verdict and that the Court should have given peremptory instructions for the defendant below. We shall devote our time principally to the matter of these two assignments.

The basis of the suit was the charge that plaintiff in error, a Copper mining corporation, operating at Ducktown, was negligent in that it had not properly inspected the walls and roof of the large mine in which Simpson was at work, and had failed to exercise diligence in keeping the openings free from overhead dangers, in consequence of which neglect loose rock and earth, made loose by explosions and exposure to water and air, tumbled and fell upon him and others while at work; and further, that it was the duty of the company to look for and remove dangers before sending men to their working places underneath, a duty which the company had neglected on the day Simpson was injured, in consequence of which he was exposed to unnecessary risk and was struck and killed by falling substances while in the performance of his tasks as the loader of ore into cars.

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There was a plea of not guilty. Not yielding the contested ground that the company was in any respect negligent, the main insistence is that Simpson both assumed the risk of the situation at the time he was killed and was guilty of proximate contributory negligence.

We do not understand the rule to be that when a defendant enters a motion for a directed verdict at the conclusion of the testimony introduced by both sides, the Court must look alone to the evidence brought forward by the plaintiff. It is true that every question of fact must be resolved in favor of the plaintiff and all reasonable deductions from the facts tending to support the plaintiff's claims must be made. But we are not aware of any rule which forbids the Court's assumption of an indisputable fact or an unassailable inference, although it be found in the evidence adduced by the defendant. A fact appearing in a record that cannot be juridically disputed should be accepted for juristic purposes upon the motion for peremptory instructions, regardless of the source from which it is shown. Otherwise the allowing of such a motion after the defendant has introduced evidence would be absolutely senseless. A better statement of it would be that where from the facts clearly shown one conclusion only is deducible, or if all the evidence tends to the one conclusion, the case should be taken from the jury. *McLean v. Railroad*, 18 L. R. A. (N. S.), 763. Such we understand the rule to be as announced in *Traction Co. v. Brown*, 7 Cates, 323.

We shall lay aside while considering these assignments of error two questions raised, one to the effect that the man in charge of the mine was a certificated foreman; the other, urged by Mrs. Simpson, being that her husband was under the immediate control of a boss by the name of Tankersly and was killed while obeying Tankersly's direc-

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tions. This elimination brings us directly to the question of the extent of Simpson's knowledge and appreciation of the dangers and his method of conducting himself after ascribing to him that degree of knowledge which the evidence warrants.

The Company is the owner and operator of a large copper ore mine at Ducktown. The ore was reached in the first instance by or through a shaft extending beneath the surface to the strata of ore which are to be found in that territory. From this shaft rooms or alleys extend along levels or planes. The work of excavating ore is pushed from time to time; and when one stratum is exhausted or excavations are extensive, the shaft is driven deeper until another or other strata are reached. In this particular mine there are many levels extending laterally from the shaft. The levels were and are designated as Nos. 10, 20, 30, 45, 55, and 65. Simpson was at work on the 55 level, which was some four hundred feet beneath the surface. There was an opening between the 45 and 55 levels, and an opening between the latter and the 65 level. This opening exposed a part of level 55 to the roof or covering of the 45 level, making the distance from the floor of the 55 level to the roof of the 45 level something over one hundred feet.

By means of powder explosions ore would be shot or knocked down from the roofs and sides of the openings and then loaded on small cars, and taken to the shaft and thence to the surface. Simpson was engaged as one of these car loaders or trammen. Several men were working in conjunction with him. One of them had the duty of breaking larger pieces into smaller ones. There were a crew of men called balk ground men, whose duty it was, when notified, to examine the walls, sides or roofs for rock and ore and dirt that were likely to fall. Simpson and his co-workers, upon the day that he met his death, labored

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until eleven oclock, when they suspended about one hour for dinner. They resumed work about twelve o'clock. Simpson met his death about one hour later while attempting to replace a car which had jumped the track.

Learned counsel for defendant have much to say about there having been a great deal of firing done on the 45 level before or about noon without the knowledge of Simpson, or at least without any knowledge on the part of Simpson that there was any danger lurking in or on level 45 because of this shooting. It was also forcibly presented to us at the bar of the Court as a controlling proposition or view that before Simpson returned to his work he was assured by parties representing his employer in the matter of giving assurances that the firing had ceased and that labor out in the open might be resumed.

We shall dispose of these contentions in this immediate connection. One fact admitted or established is that the firing on the 45 level had ceased sometime before Simpson went to the place at which he was killed. Another fact indisputable is that, granting that the response from the 45 level was that the firing was over, Simpson was afforded ample opportunity to protect himself from impending dangers an appropriate and appreciable length of time before he was killed. We are constrained to state that we consider the circumstance of the shooting on the 45 level about twelve o'clock and the further circumstance that Simpson was told that he might return to work as remote considerations. They are not to be taken as of immediate concern, in view of some uncontroverted points to be subsequently mentioned. Nor do we think that the contention that Tankersly was the leader of the trammen of any importance.

With one voice the witnesses assert that Simpson was a man of wide experience, thorough knowledge and some

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skill in mining operations. An irrefutable presumption is that he not only knew the dangers of his situation, but was virtually aware of all signs and appearances which indicated danger. He well knew that he was engaged in an occupation fraught with extreme hazard, and that at any time the immutable laws of gravity might claim him and his co-laborers as victims.

One uniformly threatening appearance and an unmistakable indicia of impending harm in ore mines is shown to be the falling of fines. These are small particles of rock and ore that come from the roof or sides of the mine as the forerunners of an avalanche of materials. The witnesses are unanimous in their statements that when these little pieces begin to fall the indication is that heavier pieces are being loosed and will soon be precipitated. Simpson knew this as well as anyone.

He with others was out on level 55 loading a car. Let it be granted that he had just before this heard some men from the 45 level say that the shooting had ceased and that the laborers on 55 might return to work. While loading this car fines began to fall all about them. They retreated to what is called the brow of a stope, which seems to be a worked out place with a rock or dirt roof left after ore is taken out. All admit that the proper thing to have done was to remain in this place of safety until the balk ground men or a foreman of the mine should be communicated with, to the end that dangerous conditions could be removed. Simpson and his co-laborers made no effort to communicate with anyone.

They remained in this position of safety for about five minutes. At or near this time Simpson either suggested or heeded the suggestion of a fellow laborer (the former is doubtless the fact), that they return to their work. Within about five minutes after doing so some large pieces

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of rock and ore fell from the 45 level and struck Simpson and a co-worker and injured them in such a way that they died.

Simpson's return to work was not preceded by any command that he do so, nor by the lead of anyone whom it was his duty to follow, nor by any assurance of safety after receiving the unerring warning or advice always conveyed by falling fines. He was a job man, and was to some extent the disposer of his own time. There was over him no task-master to drive him to his post lest time be lost.

It was a well established rule of the company that the falling of fines should be reported to the foreman or to the balk ground men; and the laborers were expected to cease work until an inquiry could be instituted and the dangers removed. And this rule was in operation regardless of the period of time at which firing had taken place and regardless of the fact that there had been an order to return to work given some thirty minutes or more previously. These circumstances did not take away the portent of harm conveyed by falling fines, and did not modify the duty of the employes to take reasonable precautions against the threatened danger.

It is clearly established that there was a subsidiary custom which amounted to a stipulation between the men and the company that a man might himself judge of the harm to be apprehended from falling fines and might resume work, but always upon his own responsibility and at his own risk. The rule of the company was that fines should be reported. The fact that men sometimes did not do so was neither an abrogation of the rule nor an exception thereto. This custom amounted to this: The company wanted and expected the reporting of the falling of fines; an employe might elect to take the risk of further harm. He might resolve to or neglect to report; but when he did

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so he was chargeable with the fact that he was not comporting himself as his employer wished.

From the foregoing enumeration of the facts we are constrained to take the view, much against our feelings, that Mrs. Simpson did not have such a case as entitled her to a submission of the issues to the jury. We are convinced that both upon the grounds of assumption of risk and contributory negligence her husband contracted away and relinquished any right of action against his employer; and it is his case or right of action and not that of his widow with which we are dealing.

With respect to the defense of assumption of risk it suffices to say that the only reasonable inference from the facts admitted or clearly shown is that Simpson both knew and fully appreciated the dangers of his resumption of work, and that he had the election to remain in a place of safety or to undertake his labors in the midst of impending harm. With respect to contributory negligence it may be said that one fact is debarring, namely; the election of Simpson to disregard a rule of his employer, compliance with which would have preserved his life. Another fact is that he deliberately ignored warnings which would have been heeded by any prudent man. Further, when all the circumstances are considered, the inevitable conclusion must be that he did not take such precautions for his own safety as the situation demanded, and such precautions as his master had the right to expect of him. Besides, we are not persuaded that the company was in any way to blame.

The Courts cannot ignore these two defenses. Their modification to the extent of abolishment must come from the legislature. Nor must recoveries stand against employers not in fault. This is now the rule in this State.

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We are of the opinion that the learned circuit Judge was in error in not directing a verdict. His judgment is reversed with direction that judgment be entered here dismissing plaintiff's suit. We have deemed it unnecessary to encumber this opinion with extracts from or the citation of authorities. The legal rules applicable to this case can be found in the primers of the law.

It is disclosed by the record that this mine was in charge of a certificated foreman. Plaintiff below might be precluded from recovery upon this ground alone: *Iron Co. v. Francis*, 130, Tenn., 694, but we do not insert this as one of our turning points of decision.

We shall remark in conclusion that the Court was in error in not charging the fourth and fifth special requests of defendant below. No other errors need be considered. Defendant in error will pay the costs of the cause.

Firestone v. Caldwell.

J. P. FIRESTONE v. JOHN D. CALDWELL, RECEIVER.

PLEADING AND PRACTICE. *Appealed case. Stipulations of counsel before Justice of the Peace. Binding effect.*

In a case instituted before a Justice of the Peace parties appeared in person and by attorneys and entered into a stipulation as to the facts of the case. The Justice rendered judgment in accordance with his conception of the law. The case was thereupon appealed to the Circuit Court. When called an attorney other than the one representing the losing party appeared and resisted the introduction or reading of the stipulations entered into or agreed to by the attorney before the Justice. The Circuit Judge held that the appellant was not bound by these stipulations and admissions. Held in this Court that the Circuit Judge was in error, and that the appellant was bound by the admissions made by his attorney under the circumstances.

FROM McMINN COUNTY.

Appeal in error from the Circuit Court of McMinn County, SAM C. JONES, Judge.

CLEM J. JONES & DAVIS, for plaintiff in error.

EUGENE IVENS AND GEORGE STUART for defendant in error.

SPECIAL JUSTICE R. H. SANSOM delivered the opinion of the Court.

This cause along with some five or six others, based upon a like state of facts, the same evidence and the same written contracts was heard in the Circuit Court for McMinn County, before the presiding Judge and a jury, and

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upon the completion of the evidence in the case motion was made by the plaintiff below, Jno. D. Caldwell, Receiver, for instructions to the jury to return a verdict in his favor. A like motion was made in behalf of the defendants below for instructions to the jury to return a verdict in their favor.

The Court, after argument of counsel, instructed the jury to return a verdict in favor of the defendant below, J. P. Firestone, this carrying with it a like instruction as to the defendants in all of the other causes. The jury so returned the verdict and the suits were accordingly dismissed at the cost of Jno. D. Caldwell, Receiver. Motion for new trial was entered, based upon two grounds: that the Court had erred in declining to sustain the motion of the Receiver for peremptory instructions in his behalf, and that the Court was in error in sustaining the motion for peremptory instructions in behalf of the defendants.

It appears that these suits were instituted before E. B. Madison, a Justice of the Peace for McMinn County, in 1913 perhaps; that the defendants in the Justice's Court, J. P. Firestone and others, were represented by Jno. C. Ramsey, an Attorney; that in his representation of them he entered into a written stipulation of facts for his clients with the Plaintiff below, Jno. D. Caldwell, Receiver, through and by his Attorney D. Sullins Stuart, and that the case of *Caldwell, Receiver v. Firestone* was heard before the Justice of the Peace, E. B. Madison, upon this stipulation of fact entered into between counsel for the respective parties.

It further appears that the defendant Firestone together with other defendants interested in the same question were present before the Justice of the Peace at the time the cause was heard and determined by the Justice; that they heard the stipulation of fact read, understood it was being

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entered into by their counsel Mr. Ramsey and made no objection thereto.

It does not appear that the stipulation of fact thus entered into between counsel for the respective parties contains any clause that is not in accord with the actual facts of the controversy. Among other parts of the stipulation it contained the agreement that it should be binding upon the parties not only in the causes and the trial thereof before the Justice of the Peace, but should likewise be binding upon the parties in other Courts having appellate jurisdiction.

It appears in the record that Mr. Ramsey, the Attorney who represented J. P. Firestone and his associates before the Justice of the Peace, was only employed and paid to represent them before the Justice of the Peace, it being the understanding between parties that he would be paid an agreed sum for his appearance before the Justice of the Peace and that if continued to represent the parties in the upper Courts he should be paid for his services in the several Courts.

It further appears that Mr. Ramsey entered a motion in the causes in the Circuit Court making demand for a jury, but that this demand was made without having been specifically employed by the parties in that Court. It is very clear that Mr. Ramsey's actual employment by these defendants did not cover any territory except his services in the trial cases before the Justice of the Peace. It is equally clear that the defendants were present when the cases were tried before the Justice of the Peace and knew that this stipulation of fact had been entered into by their Attorney, and that they made no objection of any character either to the fact of his having entered into the stipulation or to the contents of the stipulation itself.

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It is fair to say and fairly inferable from the record that the defendant Firestone and the others occupying a like attitude with him did not appreciate the fact that the stipulation contained any clause binding the parties beyond the Justice of the Peace Court.

The Justice decided the case against the contention of Plaintiff below, Jno. D. Caldwell, Receiver, under the facts so stipulated. After the trial before the Justice of the Peace and before the trial in the Circuit Court the services of Mr. Ramsey as counsel for the defendants were dispensed with, and E. E. Ivins was employed by the defendants to represent them in the Circuit Court; this employment of Mr. Ivins having been without consultation with Mr. Ramsey. Upon his employment Mr. Ivins notified counsel for the Receiver that he would not abide by, but for his clients he repudiated the statement of fact entered into by Jno. C. Ramsey, their Attorney, before the Justice of the Peace. It is agreed between parties that if Jno. C. Ramsey had the right, as Attorney for these parties, to enter in this stipulation of fact so as that it should be binding not only in the Justice of the Peace Court, but in the Circuit Court, that then Jno. D. Caldwell, Receiver is entitled to the judgments sought in all of these causes, whereas, if J. C. Ramsey had no authority to make such stipulation of fact so as to bind his clients beyond the Justice of the Peace Court, and the same is invalid and unavailable in the Circuit Court that then the Plaintiff below, Jno. D. Caldwell, Receiver, was and is not entitled to any judgment and all the suits should be dismissed. This being true the sole question to be determined in this Court under the assignments of Error is whether or not Jno. C. Ramsey, the Attorney in the case before the Justice of the Peace, was authorized to enter into the stipulation, by the terms of which his clients could be bound and would be bound in the Appellate Courts.

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The deposition of J. P. Firestone, the defendant, is taken in this case and Mr. Firestone proves no fact at variance with the facts stipulated in the writing signed by J. C. Ramsey and constituting the agreed statement of facts.

There is no proof really in the record to controvert the facts contained in that stipulation. The basis of the Court's holding below was that Mr. Ramsey, counsel for the defendants before the Justice of the Peace, had no authority to bind the defendants by this stipulation in any trial of the case beyond the Justice of the Peace forum, and this stipulation of fact being the only proof offered in behalf of the Plaintiff J. D. Caldwell, Receiver, in the Circuit Court. The Court peremptorily instructed the jury to bring in a verdict for the defendants.

The Court's attention has not been directed to any specific case in Tennessee. Passing from this direct question the case of *Jones v. Williamson*, reported in 5th Coldwell, at page 371, *et seq.*, is quoted as bearing upon this question, although a reference to that case discloses the fact that the question was only indirectly involved.

The Supreme Court through Justice Milligan in that case says:

"Without attempting to reconcile the apparent conflict in the case cited, it is clear, that much sanctity must be attached to records of Courts, and great consideration given to the appearance of counsel in a cause. He is an officer of the Court, who, by his license, granted in this State by two Judges, is recommended to the public confidence, and it is not presumed he will betray that confidence; *and if the opposite party who has concerns with an attorney, in the business of a suit, is bound always at his peril, to look beyond the attorney to his authority, it would be productive of great public inconvenience.* The mere fact of his

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appearance is always deemed enough for the opposite party, and for the Court; and if his authority be doubted, under our practice the attorney, on motion, may be required to show it. But if his clients denial of authority is to vacate all the proceedings of the cause in which he appeared, the consequences would be *Mischievous, indeed; Denton v. Moyes*, 6 John, 301; *Gorham v. Gale* 7 Cow., 739."

In Jones' Commentaries on Evidence a comparatively recent work called the "Blue Book of Evidence," there are two or three Sections bearing directly and remotely upon the questions at issue. Section 257 of Volume 1, 2, at page 453 of this work is in these words:

"In the conduct of litigation it is frequently to the advantage of the parties for their attorney to make stipulations as to questions of fact or dispensing with proof of certain facts. Duly appointed attorneys are deemed the agents of their clients for the purpose of making such admissions in all matters relating to the progress and trial of the action. Statements made before or after employment are of course excluded. Indeed, any fact, bearing upon the issues involved, admitted by counsel may be the ground of the Court's procedure equally as if established by the clearest proof. When admissions of this character are formally made for the purpose of waiving certain proofs or rules of practice they are conclusive upon the client and cannot be withdrawn. It would operate as a fraud upon the adverse party, if, after he had been thus induced to withhold necessary proofs, he should be compelled to prove the facts which had been admitted, or to submit to defeat. The assumption by an attorney at law, even, if generally retained, of authority to act for his principal outside of the due and orderly prosecution, defense, or conduct of litigation or proceedings in Courts does not

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create any presumption of actual authority so to act, but, as in the case of other agents, his acts must be shown to be within the scope of his authority, else they will not bind his principal. The statements and admissions of an attorney at law in respect of his principal's business are inadmissible against his principal unless it is specifically shown that they were authorized or that they were made in the due and orderly conduct of a case for the distinct purpose of dispensing with formal proof of the facts to which they relate. During the progress of the trial attorneys stand in the place of their clients and may perform the same acts which such clients might perform in person; hence, there is scarcely any limit to the admissions which they may make. Such admissions are not confined to stipulations regarding the facts of the case or to the waiver of proofs. The attorney may, by his express statements during the trial or by his mode of conducting the action, waive a part of the relief which he might otherwise claim. And by the constant practice of the Courts, parties are precluded from questioning the regularity of the proceedings or the competency of evidence to which they have failed to make timely objection. But, although the English rule is otherwise, by the clear weight of authority in the United States attorneys have no implied power to compromise and settle their clients' claims. It is essential to the orderly conduct of business in the Courts that attorneys who stand in the place of their clients should frequently make formal admissions of the character already mentioned; and, if made in the presence of the Court, it is immaterial whether they be oral or written or whether they be express or plainly inferred from the conduct on which the opposite attorney and the Court have the right to rely, and in such cases the admissions and acts of the attorney are to be treated as those of the client; and are conclusive upon him,

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unless fraud or collusion is shown. Stipulations in writing made by attorneys out of Court dispensing with proof of certain facts are also conclusive upon their clients. It is a good illustration of the effect given to the admissions of counsel that the Courts sometime grant a nonsuit or in the Federal Courts direct a verdict upon the opening statement of the plaintiff's counsel, when such statements are unambiguous in their meaning, and in the opinion of the Court clearly show that there should be no recovery. Where attorneys make statements as to facts in controversy in the presence of their clients who make no objection, such statements are competent as admissions."

And in this text is referred to cases from various states sustaining the principles therein enunciated. Section 257a of the same work is in these words:

"Attorneys may bind their clients by admitting the execution of instruments; the amount due on a debt; they may dismiss or discontinue an action; consent to a nonsuit; stipulate as to the issues to be tried, consent to the entering of judgment; waive informalities; consent to a reference or admit all the facts in issue for the purpose of determining the question of law involved. 'The retainer of an attorney at law to conduct an action confers upon him authority to stipulate with opposing counsel after the rendition of a judgment in favor of his client and after the close of the term of Court at which it is rendered, but within the time for procuring a writ of error, that the case shall abide the final decision of another action which involves the same question and is conducted by the same attorneys.' Where letters were not written by an attorney defending the action with the purpose of dispensing with proof otherwise required of the plaintiff, and there was no evidence that the attorney who wrote them was authorized to make the statements and admissions which they contained, the letters were inadmissible."

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Section 259 of the same Volume is as follows:

"We have hitherto considered only the effect of admissions in the course of litigation confined to one action or suit, but they are not always definitely limited to their operation. The general rule is that the admissions made by an attorney in one action are not admissible in a different action between the same parties. But where an absolute and unqualified admission is made in a pending cause, whether by written stipulation of the attorney or as matter of proof on the hearing, it may be used on a subsequent trial and cannot be retracted, unless by leave of the Court on a proper showing of mistake, imposition or surprise. But mere informal admissions made by counsel in one trial are not admissible in a second trial; and admissions by an attorney in the trial of a cause as to the amount of damages in case of recovery do not bind his client at a subsequent trial. Some of the cases already cited illustrate the rule that admissions of this character are not confined to the statements or stipulations made by the attorney during the trial of the cause. The admissions may be before the trial and may be derived from the bills of particulars, or notice, or other documents served during the progress of the cause. It is hardly necessary to add that the statements of an attorney are not admissible if made before his employment commenced or after it had ceased. Nor is it to be inferred that an attorney has authority to compromise a claim left in his hands for collection by receiving a sum less than its face value. Whenever the statements of an attorney would be competent as admissions, the statements of his clerk acting in his place are also competent. It sometimes occurs that the statement of an attorney, though incapable of use in one matter against the client as an admission is not wholly worthless, but can be turned to account in another matter to prove the knowl-

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edge of the attorney of the fact admitted and thus throw light on subsequent transactions connected with the main issues wherein he is otherwise interested."

The manifest purpose of the stipulation signed by Mr. Ramsey the attorney for the various defendants as shown upon the face thereof, was to save the cost and expense incident to the preparation of four or five different law suits and stipulate the facts about which there was seemingly no controversy, and thus minimize expenses to parties.

We are of opinion that under the record disclosures in the case now under consideration, the stipulation entered into by counsel was a laudable one—that of conserving and promoting the best interests of all parties in the saving of cost and expenses as well as the saving of time and expenditure of labor in behalf of the Courts, counsel and litigants. A different view might be taken of the matter if it were made to appear to this Court that any sort of wrong or injury had resulted to these defendants below or could result to them by reason of any *mistatement* of fact in the stipulation. If it were made to appear in the record that any fact stipulated as being true was not true, to the prejudice of any of the defendants, the Court would hesitate and pause before going forward to any distinct holding that the parties were bound thereby. Counsel occupy a position toward clients of the very highest order of trust and integrity. The confidences committed to their care are not to be abused or violated; interests committed to their care are to receive at their hands their very best effort and talent. The integrity and good faith of such relation as that existing between attorney and client makes the demand upon the attorney pre-eminently high, his course of conduct must be clean and above reproach, and when it occupies that attitude and when it is shown that he has discharged that trust or has exercised his best effort toward

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the discharge of the trust, that the efforts as thus exercised were within the knowledge and apprehension of the client and that they the clients have lent a silent if not active assent thereto, this Court is inclined to the view and so holds that the client must be held to be bound by the clean, known, unrepudiated, tacitly assented to acts in their behalf of their counsel where nothing is made to appear in the case that is at variance with the absolute verity of the course and conduct of counsel as is the case under this record.

Limiting our holding to the facts of this case and without enlarging upon it as to its general application, we hold that the stipulation entered into by Mr. Ramsey in behalf of the defendants, the facts set out therein being practically uncontroverted, is binding upon the parties and the Court will not suffer the clients to repudiate this act of counsel.

The result is that the Assignments of Error are sustained, the judgment of the lower Court is reversed and judgment awarded in this Court in accord with this holding. This result attaches itself to all causes involved.

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RAYMOND WALLACE V. A. J. AND EVA COX.

Affirmed by Supreme Court, 1916.

PARENT AND CHILD. *Liability of parent for surgical fees for operation upon daughter.*

A surgeon who operates upon a child because of a condition which is imminently dangerous to life and which operation is deemed necessary to save the life of the child may recover from the father for those services where the father had assented to the operation but desired another surgeon than the one who did it.

FROM HAMILTON COUNTY.

Appeal in error from the Circuit Court of Hamilton County, NATHAN BACHMAN, Judge.

MURRAY & DRAPER for plaintiff in error.

_____ for defendant in error.

SPECIAL JUDGE R. H. SANSOM delivered the opinion of the Court.

This is a suit instituted by the Plaintiff in error, a practicing physician, against the Defendants in error, father and minor daughter, for professional services rendered by the Plaintiff in error to Eva Cox, the daughter.

The suit was begun before a Justice of the Peace, and a judgment was rendered by that Court in favor of the Plaintiff in error, and against the Defendant in error, A. J. Cox, for \$150.00 and costs. The suit having been dis-

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missed as to Eva Cox. From this judgment an appeal was prosecuted to the Circuit Court by A. J. Cox, one of the defendants in error. No appeal seems to have been prosecuted by the Plaintiff in error, Dr. Wallace, from the judgment of the Justice dismissing the case as to the defendant in error, Eva Cox.

The cause was heard in the Circuit Court under appeal, having been heard by the Court without a jury, and the findings and judgment of that Court were in favor of the defendant in error, A. J. Cox, and accordingly the suit was dismissed at the cost of the plaintiff in error, Dr. Raymond Wallace.

Motion for a new trial was overruled by the Court and an appeal prayed and prosecuted to this Court, and errors have been assigned, eight in number, as follows:

I.

The Court was in error in not holding there was an express contract between plaintiff and defendant, A. J. Cox, to allow plaintiff to perform the services upon which suit was brought to recover compensation.

II.

The Court was in error in not holding that there were circumstances from which a promise could be implied.

III.

The Court was in error in not holding that there was some clear and palpable omission of duty on the part of the defendant, A. J. Cox, in providing medical services for the child under which circumstances the doctor would have the right to perform the operation and recover therefor.

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IV.

The Court was in error in not holding that Mary Cox had authority to employ the plaintiff to perform the operation upon the daughter and authorizing the charge to the father.

V.

The Court was in error in not holding that there was a special exigency rendering the interference of the doctor reasonable and proper.

VI.

The Court was in error in refusing to give the plaintiff a judgment against the defendant, A. J. Cox, for the sum of \$62.00 for services rendered after defendant's daughter, Mary Cox, admits informing plaintiff that the father had agreed for him to perform the operation and render consequent treatment.

VII.

The Court was in error in not holding that there was an implied contract between the plaintiff and the defendant when the father was apprized that the services were about to be performed and failed to object.

VIII.

The Court was in error in not holding that after Mary Cox informed plaintiff that the defendant, A. J. Cox, authorized the work to be done (even though after the operation) that she would have been acting for an undisclosed principle, and as soon as she disclosed him plaintiff would have the right to hold him liable for services rendered."

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There seems to be little controversy over the facts in this case. It appears that the defendant in error, A. J. Cox, was formerly a resident of Chattanooga, Tenn., and that some years before the institution of this action he removed to Bradley County; his two daughters, Mary an adult presumably, under the record, and Eva Cox, a minor, remained in Chattanooga, with the avowed purpose as indicated, if not distinctly shown by the record, of making their own living. The record discloses neither assent nor dissent to this course upon the part of the daughters by the parent, defendant in error, A. J. Cox. The two daughters for some while apparently, had been making their headquarters at the Y. M. C. A., building. It appears that the minor daughter Eva Cox had been suffering from fainting spells, which the Court may easily infer from the record, were increasing in frequency if not in force, and that the Secretary of the Y. W. C. A., under these conditions, called the services of the plaintiff in error, Dr. Wallace, into requisition for care and proper attention to the minor, Eva Cox. The services thus rendered, as shown by the record, developed in bringing about an improved physical condition upon the part of the patient, but did not restore her altogether physically. It further appears that the plaintiff in error as the attending physician, advised the necessity of a surgical operation, stating that the operation to be performed was not a difficult one, was simple, but would be necessary in order to relieve the patient and avoid possibly serious consequence if the patient were not relieved of the difficulty.

It further appears that the adult daughter of the defendant in error and sister of the patient, being advised of this state of affairs called her father, the defendant in error, A. J. Cox, by telephone at his residence in Cleveland and advised him of conditions, stating to him that the

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physician advised the operation and that it was a simple one, not disclosing to the father so far as the record shows what the difficulty was; that the father asked whether or not the use of the knife in performing the operation would be required, and was told by the daughter that it would not be necessary to use the knife and perhaps stated to him that the knife would not be used. Whereupon the father expressed his assent to the operation. Saying, "Well, if it must be done, it must be done," and perhaps the next day following this conversation between the adult daughter, the operation was performed and successfully performed and the patient relieved after a confinement in the hospital for some two or three weeks.

It is not clear from this record whether the Plaintiff in error, Dr. Wallace, was advised by the adult daughter of the fact that she had communicated with the father and his assent have been secured until perhaps two or three days after the operation was performed. The Court is inclined to the conclusion of fact that this conversation between the daughter and the father was not made known to the physician until after the operation had been performed. The record is clear and emphatic that the adult daughter in communicating with the father did not ask him or suggest to him that he pay the expenses incident to the illness and operation and made no suggestion in respect thereof, no mention of the question of payment and the father in no way referred to the question. It is fairly clear that neither the father nor any of the daughters, including the patient, labored under the impression that the knife was to be used in the performance of the operation.

The father makes this statement and this is seemingly uncontroverted in the record, in referring to the conversation between himself and the adult daughter over the 'phone:

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"I asked her what kind of an operation. She said that it would be very slight and not a serious one, I then asked her if there would be an incision or a knife used, and she said no. I then said to her that if it had to be done, it had to be done. . . . She didn't ask me to stand for the Doctor's bill, and I didn't promise to pay for the operation. If I had been informed that it was a serious operation and that she had to go under the knife, I would not have consented to it, but I would have come straight to Chattanooga and would have employed Dr. Holtsclaw, or some other physician with whom I am acquainted, to perform the operation. I didn't know the plaintiff, Dr. Wallace. I never saw him before to-day that I have recollection of and I would not have agreed for any man to have performed an operation on my child unless I had been well acquainted with him and had confidence in his ability as a surgeon."

As stated the age of the minor at the time this operation was performed, according to the statement of the father, was seventeen years. The success of the operation as we understand from the record is not questioned. The father says in respect of the daughter living separate from the family and not under the parental roof:

"When I removed from Chattanooga, my two daughters Mary and Eva, decided that they didn't want to leave Chattanooga, and so they remained there and since that time they have been living away from me and making their own living and doing as they pleased."

No question is made as the Court gathers from the record, upon the reasonableness of the bill for the services rendered and upon which the recovery sought is based. The sole basis of resistance of recovery being that the father is not liable for the debt. The general rule is, that the father is liable for the necessities of his minor children

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and that the obligations accruing in the necessary and unavoidable support of the child may be enforced against him as a legal liability.

Under the Tennessee rule the father is compelled as matter of law to care for, educate and maintain his children until the attainment by them of their majorities, or until there shall be a voluntary abandonment of such parental protection and care or refusal by the child to yield to parental authority. The duties between parents and their children are not altogether one-sided, but are mutual. While as stated, the law charges the parent with the duty of maintenance, education and protection of the child, it at the same time charges the child with that reverence and obedience to the parent commensurate with the circumstances and conditions surrounding the parties. The parental duty of support and maintenance is based to a degree upon the *services* to be rendered the parent by the child, so that if the authority of the parent is repudiated by the child, of his or her own volition, not contributed to by the parent then the legal obligations resting upon the parent to maintain the child becomes abrogated. Where there is a separation by mutual assent so that the child is not a member of the household, is not living under the parental roof, but is engaged in the laudable effort at self-support, maintenance and education by their own exertions, under consent of the parent, the mutual duties and obligations of the parent and child are not destroyed, they are not minimized, but remain in full force and effect and are absolute. The Courts can conceive of no more laudable undertaking upon the part of the minor child than the effort at its hands, by the consent of the parent, to yield assistance by their own effort toward their maintenance, education and support, and thus lessen the duties and responsibilities resting upon the parent under the law.

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The Tennessee cases—*Toncray v. Toncray*, 2nd Shannon's cases, p. 408; *Evans v. Evans*, 125 Tenn., 17 Cates, 112, are not in conflict with each other or this holding under the Court's view of the law as applicable to the particular facts of the present and those cases. The *Toncray* case is one where the brother undertook the maintenance and education of his sister as a volunteer, the sister having abandoned her father's home without fault upon his part, and the brother having thus voluntarily undertaken the support of the sister under these circumstances, he sought thereafter to recover the expenses incident thereto, from the father. The Court held that he was not entitled to recover in that case, nor because the father wasn't charged with the duty of maintenance, support and education of the minor child under ordinary conditions, but because the minor child had abandoned the home provided for her voluntarily and without the wishes of the parent, and the brother as a volunteer, sided with the minor child in her abandonment of the father and want of love and respect for him and in her abandonment of the duty and consideration owed by her to her father, and under these sort of circumstances he could not recover. There is no question in the opinion of this Court of the accuracy and soundness of that doctrine.

The case of *Evans v. Evans* is one where the mother was forced to sue the father for divorce because of wrongs committed by the father against the mother, which wrong constituted the basis for the divorce proceeding, and the divorce was granted the mother from the father by reason of his own misconduct. The recovery in that case was sought by the mother against the father for certain expenditures of money made by her in the support and education of their minor child, and the holding of the Court was that the father was liable notwithstanding the separation

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by the mother from the father, and divorcement, because of his misconduct, and the granting of the care and custody of the child to the mother as the proper custodian thereof; that under the facts developed the decree of divorcement pronounced could not operate to relieve the father of the legal obligations resting upon him for the support and maintenance of his minor child. Any holding in the opinion of this Court to the reverse of this proposition could find no solid basis in law, logic, good faith, or integrity; no sound law permits any man to take advantage of his own wrongs, to the detriment and injury of another, and especially is this law applicable to the exalted relations subsisting between husband and wife, and parent and child; in this case this child, this minor child, was living separate and apart from the father, not because of any wilful wrong so far as is disclosed by the record, but by the consent of the parent with the laudable desire and purpose to relieve the parent as far as might be of the duties and responsibilities incident to her maintenance.

There is no indication even from the facts disclosed in this record of a purposed abandonment or refusal upon the part of this minor child to be subject to parental control, but simply the effort to relieve the father from parental expenditures to the extent her own exertions might aid in yielding her own living. Certainly a most commendable purpose and aim.

Under the father's own statement, had he known of existing conditions, he would have immediately incurred the expense of making a special trip to Chattanooga and would have secured the services himself of Dr. Holtzelaw or some other physician that he *knew and had this same operation performed if* it were found necessary.

There is nothing in the record to indicate even, that the plaintiff in error, Dr. Wallace made any mistake in his

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diagnosis of the difficulty under which the patient was suffering, or the necessity for the operation to relieve this difficulty. No question is made but that the operation was performed successfully. No question can be made of the success of the operation, because the sister of the patient herself, says that while for a season after the operation the fainting spells continued, that they finally ceased, and the trouble had passed away. The results of the operation had proven successful.

Whether or not the conversation by the adult daughter was held over the 'phone with the father, at the request or by the knowledge of the physician, or whether or not the fact of the father's statement to the daughter over the 'phone was communicated by the daughter to the physician prior to the operation, in the view taken by this Court, are not the controlling questions. The facts are that this daughter was a minor, that she was suffering from physical ailments, to be relieved of which, an operation was necessary; that this operation was performed with the knowledge and consent of the parent, the benefits were received by the child. The father, under the law is liable for the necessities of the child. That being true we think he is liable for this debt to this physician, incurred in this way, which in the Court's opinion was a pressing necessity faithfully and efficiently met.

The result is that the holding of the Circuit Judge is reversed and judgment will be entered here for the amount of this bill, \$150.00, in favor of the plaintiff in error, Dr. Raymond Wallace and against the defendant in error, A. J. Cox, together with all costs.

Life & Accident Insurance Co. v. Bradley.

NATIONAL LIFE & ACCIDENT INSURANCE CO. v.
ROBERT BRADLEY.

Affirmed by the Supreme Court, 1916.

1. ACCIDENT AND SICK BENEFIT. INSURANCE. *Liberal construction of policy.*

An accident or sick benefit insurance policy must be liberally construed in favor of assured.

2. SAME. *Confinement to room. When.*

A policyholder is confined to his room within the meaning of a policy when he is totally blind, unable to work, and leaves his room at infrequent intervals in the company of his wife for the purpose of seeing his physician.

3. SAME. *Attendance at room by physician.*

And such policyholder is attended by a physician as required by the policy where he is forced to visit the physician instead of having the latter call upon him.

4. SAME. *Certificate of physician as conditions precedent to right to indemnity.*

A provision of this nature is reasonable.

5. SAME. *But may be waived or right to demand lost.*

But such provision may be waived. And where payment of indemnity was refused upon other grounds, and where policyholder was told that tender of certificate would do no good, the company is estopped to rely upon failure in this regard.

FROM WASHINGTON COUNTY.

Appeal in error from the Circuit Court of Washington County, DANA HARMON, Judge.

Life & Accident Insurance Co. v. Bradley.

JAMES B. COX for plaintiff in error.

GARDNER I. BARLOW for defendant in error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

Bradley was the holder of an accident and sick benefit policy issued to him by the plaintiff in error. This policy among other things provided for an indemnity or benefits in case of sickness. Claiming that he was ill and disabled within the meaning of the certificate and asserting his right to indemnity for twenty weeks on account of the loss of his eyesight, Bradley brought this suit. The company defended upon the ground in the first place that the policy holder was not actually confined to his bed or room and there visited by a physician, and that he had failed to furnish the statement of an attending regularly licensed physician to the effect that he had been visited at his room by such physician. The cause was tried by the Circuit Judge without the intervention of a jury. His Honor was of opinion that Bradley was entitled to full indemnity of \$100.00 and interest and rendered judgment accordingly. The company has appealed and assigned errors which will be considered by us.

The policy is peculiar in that it does not specify the ailments for which benefits might be claimed. Hence it must be construed as covering any sickness or disorder which is an ill of such a nature as to necessitate cessation from labor and confinement to house or room. Bradley testified that during the entire period of twenty weeks and the life of the policy he was totally blind, unable to perform any manual labor, and was confined to his house or room during the whole period except when he would go to visit his physician or out in town, but was always accompanied by his wife; that he was incapable of guiding or

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guarding himself and was dependent entirely upon his wife for assistance in such matters; and that he did not depart his house or room without her accompanying him, and then only to consult his physician, who resided in Bristol. He states that he was totally disabled from laboring, and that his eye troubles were occasioned by the work which he did in a tannery.

Bradley certainly suffered an illness and was undoubtedly sick. It is also clear from his statement that he could not follow his usual labor and hence could not earn wages. It is also true that he was virtually confined to his room because of his ailment, and that all of his absences were brief and under the necessity of an immediate return to his abiding place. He was not at liberty to go nor to roam at will, but was always restrained and confined by reason of his eye trouble.

The first assignment is that the Court was in error in holding that clause No. 2 of the policy, hereinafter copied was unreasonable. This sections is as follows:

"Weekly benefits for sickness will only be paid for each period of seven consecutive days that the insured has by reason of illness necessarily been confined to bed and there visited professionally by a duly licensed and practicing physician, or has by reason of illness necessarily been confined to his room and there visited by a duly licensed physician."

It is unnecessary for this Court to pronounce the clause just copied unreasonable. We are rather inclined to the view that it is a reasonable provision by means of which insurance companies may protect themselves from cases of malingering and also provide themselves with satisfactory evidence of illness of their policyholders. But notwithstanding its reasonableness, it must have a reasonable interpretation and a reasonable application to the facts of

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each particular case. For instance the Courts detest the literalism of such provisions and will construe them liberally, to the end that the object of their insertion in contracts of insurance be attained and at the same time not defeat the intention of the parties as understood by the one to be indemnified: *Insurance Co. v. Hawes*, 42, L. R. A. (N. S.,) and note.

Bradley's purpose in taking out this policy was to secure a small weekly benefit in case he was disabled by illness to the extent that he could not follow his occupation as a laborer. It is true he stipulated that indemnity would be demanded by him only in case of his confinement to his room and visitation by a physician; but he never thought that he had to lie abed and to have a physician come to his room and there administer to him. Whether it was incumbent upon him to have such medical attendance and whether he should show absolute confinement as a condition precedent to recovery are matters which must be arrived at by construction. If the letter of this policy be adhered to, he must be repelled. But we assert with confidence that if regard be had to the spirit, substance and purpose of the contract, then the indemnity should be decreed him. And this result can be reached without doing violence to the terms of the contract, and without any injustice to the insurance company, assuming of course that observance of the contract by the insurance company is in no wise unjust.

That Bradley was confined to his house in a limited sense is a proposition which in our judgment cannot be assailed. He was as it were chained to this corner and was not in condition to move about at such intervals as he wished and at such places as he desired. He was always attended by the keeper of his room and was thus wholly in

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or under confinement. The fact that he was out at intervals for the purpose of obtaining medical aid and to attend to necessary business matters or to obtain exercise was not in our judgment an interruption of his confinement to his room. Bradley was sick as much on the street as he was in his room. He was just as much restrained of liberty of movement in the one place as the other. He was just as much an object of care and solicitude in the one place as the other. Hence our opinion that he was confined to his room within the sense of the policy if liberally construed, and that it would be unreasonable to give the provision in question that strict construction urged by the company.

In accord with our conception of this proposition are nearly all the authorities which are accessible. For instance in *Relief Fund v. Gross*, 57 N. E. 145, the Court of Appeals of Indiana held that the going out of his house under the direction of skilled physicians was not a violation of such provision upon the part of a policy holder. It was held in *Benefit Association v. Nancarrow*, 18 Col. App., 274, that it was not a violation of this provision for the injured one to visit his physician's office, using a car-line for that purpose. In *Jennings v. Brotherhood*, 44 Col., 18, L. R. A. (N. S.,) 109, it was stated that the intention of the parties to an insurance contract is indemnity and that this intention must be kept in view and that the policy of insurance is to be construed liberally for the reason that such provisos are inserted by insurers who are interested in having them limited in their scope, that it was not requisite that the holder be actually helpless or remain in bed, and that the taking of exercise and enjoying of sunshine would not defeat his claim provided he was entirely incapacitated to work. To the same effect are *Breil v. Insurance Co.*, 23 L. R. A. (N. S.,) and

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Insurance Co. v. Hawes, supra; also *Ramsey v. Insurance Co.*, 142 S. W., 763. It is undoubtedly true that a few Courts have held to the contrary, but we find the views of the cases which we have cited to be more in harmony with our ideas of right.

It results that this first assignment of error insofar as it assails the holding of the Court that section two of the policy as to confinement did not defeat collection must be overruled. It was urged that Bradley was seen very often out in the town by himself or that he was with his wife very often. But we are governed by what Bradley himself states. His testimony is that he was not out of the house except to and from the office of his physician. There are some parts of his language which might be construed as an admission that he was out of his room with his wife, but he states emphatically that the times he was out were on his visits to and from his physician.

With respect to that part of this policy which prescribes as a condition of recovery that the sick person be visited at his room by a physician there is more room for controversy. But we have reached the conclusion that this also must have a reasonable construction and a reasonable application. Let us grant or assume that the object of such a provision was to prevent fraud and to put into possession of the company reliable information as to the illness of their policy holders. Now if it be demonstrated that the policy holder was actually ill, and especially if the ailment was at an early stage made known to the company, or if there was an offer of proof of sickness by physician which was declined, then the purpose of this clause has been obtained: and if so its literalism should not be used as the means of repelling a party who has a just claim. It has been held that the object of this provision was to furnish the company proof of sickness. Now if the ill-

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ness be demonstrated, it would be sticking in the bark to hold that the insured must be defeated because his physician was not actually at the patient's bedside, provided of course he was under the care of a physician during his illness.

We find two Courts holding that a party is attended by a physician if the former attends the latter at his office and there receives treatment: *Ramsey v. Insurance Co., supra*; *Insurance Co., v. Hawes, supra*. With these views we are going to concur in so far as they are pertinent to the facts of this case. We must not be understood as holding that there can be a substantial departure from this provision in case of uncertain illnesses or degrees of sickness. But we are of opinion that if a party visiting a physician is at the time virtually in confinement, as we have held that Bradley was, then he was attended by a physician within the contemplation of the policy.

In the second assignment it is said that the Court was in error in holding that the requirements of clause three of the policy were waived by the company. This clause is as follows:

"The insured shall not be entitled to any benefits for sickness or action under this policy unless a certificate by a regularly licensed and practicing physician showing the nature of the sickness or injury shall be furnished the company or its authorized agent."

This is a reasonable provision, but it must also be reasonably interpreted and applied. This company had an agent in Johnson City who visited Bradley weekly and was fully cognizant of Bradley's ailment and in fact paid him or arranged to pay him one week's indemnity. This agent presumably visited Bradley's house once every seven days during the entire twenty weeks for which benefits are claimed, and he continued to collect the premium knowing

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all the time that Bradley intended to claim the benefits. As before stated Bradley was paid one week's indemnity. He was getting ready to claim another by presenting his physician's certificate when he was informed by the agent that it would be unnecessary as his claim would not be paid. The reasons given by the agent, as the latter states, were that Bradley was not confined to his room and was not attended there by a physician. Bradley produced at trial the certificate of his physician showing that he was totally blind during the whole of the time for which the insurance was claimed.

We are of opinion that the company cannot avail itself of this part of the policy. In the first place the company's agent, and we are going to assume that he was authorized to represent the company generally, was fully aware of the nature of Bradley's complaint. In the next place Bradley offered to comply with this provision, but was informed that it was unnecessary. Moreover, the agent did not decline payment for lack of a doctor's certificate, but for other and distinct reasons. These are sufficient to constitute a waiver: *Snyder v. Mystic Circle*, 122 Tenn., 248; *Grand Council v. Young*, 63 Minn., 506. Again this provision is simply to impart information to the company. If it obtained this information in an indubitable way it would be idle to exact literal compliance, especially when the absence of formal certificate was not urged as a reason for not responding.

We feel constrained to overrule the assignments of error and to hold the company liable in this particular case without in any manner adjudicating that any provision of the policy is unreasonable. The judgment will be affirmed with costs.

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C. E. DANTZLER v. W. A. SADD, ET AL.

Affirmed by Supreme Court, 1915.

1. SPECIFIC PERFORMANCE OF CONTRACT OF SALE OF FOREIGN LAND.
Jurisdiction. Death of Vendor.

The Courts of Equity in this State have jurisdiction to compel specific performance of a contract for the sale of real estate situated in a foreign State; and the death of the vendor is not of itself sufficient to affect the right. The heirs of the vendor may themselves be compelled to convey, or they may be treated as trustees and the legal title transferred by decree to the vendee upon showing that purchase money has been paid.

2. VENDOR AND VENDEE TITLE BOND.

The maker of a title bond for the sale of land becomes trustee of the vendee upon payment by the latter of all the consideration.

3. FOREIGN LAWS. *Questions of fact. Foreign administrator.*

Where complainant avers in his bill that the personal representative of the maker of a title bond to land in a foreign State is compellable to convey, and further alleges that by the laws of the foreign State he is entitled to specific performance, defendants cannot rely upon demurrer. What the foreign laws are, becomes a question of fact to be determined upon proof.

4. SUIT IN ANOTHER JURISDICTION. *Enjoining of same by the Courts of this State.*

A Court of Equity in this State which has acquired jurisdiction of a subject matter situated in a foreign State may enjoin a party from going into the foreign State and instituting suit, especially if there be facts indicating a desire to evade the local jurisdiction.

FROM HAMILTON COUNTY.

Appeal from the Chancery Court of Hamilton County,
W. B. GARVIN, Chancellor.

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THOMPSON & LUSK for complainant.

THOMAS & THOMAS for defendant.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

In the first of the three bills filed in this case by Dantzler, Appellee Sadd was the only defendant. It was averred by complainant that on the 6th day of November, 1912, one J. W. Gamble and his wife Marcella had executed to him a title bond wherein they had obligated themselves to execute and deliver to complainant a warranty deed to a tract of land lying in Dade County, Georgia, upon payment by complainant of the stipulated consideration of \$3,250.00; that of this \$1,000.00 was paid in cash, and the remainder evidenced by four promisory notes payable to and delivered to said J. W. Gamble and wife; that at that time Gamble and wife were citizens and residents of Hamilton County, Tennessee, and that all the instruments mentioned were executed and delivered in Tennessee; that subsequently to the execution of said notes complainant had fully paid the balance of the consideration and had procured from J. W. Gamble a deed purporting to convey the full fee simple title to complainant; that the wife did not join, for the reason that complainant was advised that it was unnecessary; that the wife died about December 10, 1914, after full payment by complainant of the consideration, without having executed a deed to her interest in said land, her interest being a one-half undivided share; that in March succeeding defendant Sadd was appointed her administrator in Tennessee and entered upon the discharge of his duties as such; that Sadd had been requested to execute deed in accordance with the bond for title, but had refused and still refused so to do; and that under the laws of the state of Georgia it was the duty of the ad-

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ministrator upon an order of a Court of competent jurisdiction to make deed in pursuance to the terms of the title bond. The prayer was for specific performance and general relief.

Defendant Sadd interposed a demurrer in which he challenged the jurisdiction of the Court of the subject matter. He set out various grounds, but they may be summed up as advancing the contention that the suit was about Georgia real estate, over which a Tennessee Court had no jurisdiction, and that defendant Sadd could not be compelled to do anything with reference thereto. It seems that the learned Chancellor was of opinion that the demurrer was well taken; but for some reason the cause was on the docket until January 25, 1916, at which time complainant secured permission to file an amended and supplemental bill. The additional averments of this pleading were that Mrs. Gamble had died in Tennessee intestate, leaving four children and heirs at law, two of whom were sui juris and who had executed to complainant a quitclaim deed; and that the other two were minors whose guardian was the Chattanooga Savings Bank, which guardian and the two minors were made parties defendant to the amended bill, as was defendant Sadd. It was averred that all the parties were residents and citizens of Hamilton County and within the jurisdiction of the Court; full payment of the deferred notes provided for in the title bond, and efforts on the part of complainant to secure a conveyance of the property in accordance with the bond; that Mrs. Gamble was a mere trustee of her interest at the time of her death, and that nothing passed to her heirs except the right and duty to execute a deed to complainant; it was also alleged that no administrator could be appointed in the state of Georgia, and that unless complainant's bills were entertained he would be compelled

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to resort to the complicated and tedious action of ejectment; and the prayer was that title be vested in complainant and that he have general relief.

To this bill Sadd came and interposed a demurrer. It seems that no steps were taken to make defense for the minors except by their regular guardian, who joined in the demurrer. The grounds advanced were: 1. That complainant's remedy was by original bill. 2. That complainant's remedy was in the State of Georgia or by Georgia administrator. 3. That J. W. Gamble was a necessary party. 4. That the Court had no jurisdiction nor power to compel specific performance. The specific grounds of demurrer urged by the guardian were that the Courts of Tennessee had no jurisdiction to entertain a suit against it or its wards concerning real estate situated in Georgia. The Chancellor at first overruled this demurrer with leave to rely upon it in the answer. Defendants thereupon answered admitting substantially all the averments of the original bill except that the consideration had been paid. They specifically averred that said notes had not been paid as required by law, and that the one-half interest of Marcella Gamble was not paid and that her administrator had the right to collect, and had instituted suit in the state of Georgia to recover upon said notes; and it was denied that the husband had any right or authority to collect any part of the notes going to Mrs. Gamble. It was charged that Mrs. Gamble had been murdered by her husband, and that they had been living separately for some time before this occurrence; and several constitutional and statutory provisions of the state of Georgia were set out in the answer for the purpose of demonstrating that Mrs. Gamble's interest was her separate estate, and further that a Georgia administrator only or one recognized

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in that state had any authority to deal with or bind the estate.

On the 15th of February complainant filed a petition in which he sought an injunction against the maintaining by Sadd of an action in the State of Georgia looking to the collection of the notes. Complainant averred his solvency and his willingness to abide by the result of the Tennessee litigation and offered to confess judgment for the amount of the Georgia notes, to be annulled, however, if it should be adjudged that he had lawfully paid the same.

This petition was subsequently treated as an amended and supplemental bill.

On the 8th of April the Chancellor, proceeding to reconsider his action allowing defendants to rely upon their demurrers in their answer, reached the conclusion that the demurrers were well taken and that the several bills filed by complainant could not be maintained; and he thereupon proceeded to dismiss them all, deny an injunction, and tax complainant with all costs. From this decree complainant has appealed and assigned errors.

Waiving the question as to whether the Chancellor acted properly in calling up the case for decision upon the demurrers in advance of final hearing, we are of opinion that he was in error in sustaining the demurrers and dismissing the bill. We have arrived at this conclusion after mature deliberation and after undergoing somewhat of a change of view from that entertained at the time the case was argued.

It must be borne in mind that this was an adjudication without an opportunity afforded complainant to sustain his averments of fact. For instance, he alleged that he had paid every cent of the purchase money and was thus the equitable owner of the land, and that by the laws of Geor-

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gia he was possessed of the estate and entitled to a conveyance, and further, that by the laws of Georgia the personal representative of that state or of a foreign state was authorized and compellable to execute a conveyance. Whether this be the truth was a matter to be determined in due course; and if so, we are of opinion that complainant could rightfully maintain his bill for specific performance. We do not believe that our statutory provision for execution of deeds by personal representatives has any application, and we have laid it aside. But what the state of the law in Georgia is is a matter of fact. It is doubtless proper for us to look to the decisions of that state as evidence of what the law is, but it is well understood that foreign laws when disputed have to be established in some other way. But the Georgia decisions are certainly persuasive. We find that in *Grace v. Means*, 129 Ga., 638, it was ruled that the holder of a title bond who had paid the consideration would be treated in equity as the owner of the land, and that the vendor and his heirs were mere trustees. But this seems to be the rule in Tennessee: *Barker v. Smith*, 3 Sneed, 290.

It was held in *Carter v. Davis*, 30 Ga., 650, that when a party living in another state bargains for land lying in Georgia and dies in another state, his administrator appointed in that state could maintain a suit for the purchase money in Georgia and make a valid deed to the vendee. We find that a Code section of Georgia quoted in the brief of able counsel for appellee virtually authorizes a foreign administrator to execute conveyances of real estate therein. Sections 4104 and 6037. These provisions and these decisions clearly establish the fact that foreign administrators have power and authority over the realty of their intestates in Georgia. But it is urged that this power does not exist except upon the filing by the

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representative of papers in some Georgia Court. It is manifest that the sections so providing have no application to cases wherein the administrator is not the actor. But regardless of the power and the duty of a personal representative in Tennessee with respect to conveyances we are of opinion that complainant had the right to proceed in Tennessee against the heirs at law of Mrs. Gamble and to compel a conveyance by them, or to obtain a decree transferring to him the legal title to the property.

That the Courts of this state may entertain a bill for specific performance or to compel the vestiture of title to land lying outside of the state has been so long accepted as to become hornbook law: *King v. Pillow*, 90 Tenn., 287; *Anderson v. Thompson*, 132 Tenn., 80; *Johnson v. Kimbrough*, 3 Head, 587; *Kirklin v. Savings Association*, 60 S. W., 149; Ch. App.; *Massey v. Watts*, 6 Cranch, 148. This jurisdiction is exerted without regard to its effect in foreign states. In other words the Courts of this state act upon the consciences of parties and require them to perform their personal duties to the citizens of this state, leaving the effect of the adjudication to be determined in the foreign jurisdiction when possession is sought. Courts of equity simply compel parties and their privies to perform their agreements respecting real estate.

If Mrs. Gamble were living there could be no doubt of the power of a Tennessee Court to compel her to convey, assuming that she was personally bound, and assuming that the consideration had been duly paid. If she was so obligated, likewise are her children and personal representative. Complainant undoubtedly has in equity the same right against the heirs that he had against the ancestor. Hence the fact that Mrs. Gamble died did not take away the jurisdiction of the Court to compel her privies to stand by her agreement. Let it be assumed that the legal

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title to the land decended to her heirs. They hold it in trust, just as she did, and a Court of equity has the power to transfer the bare legal title to the owner of the equitable title. This is in accord with Tennessee rules: *Hale v. Darter*, 5 Humph., 81. It was there held that the heirs would be divested of title when the right of a complainant to the legal title of the property was clear.

It is urged by complainant that in the state of Georgia nothing descends to the heirs in case the holder of a title bond has paid the consideration. We need not pursue this line of thought, for the manifest reason that all possible parties to whom any interest in the land could descend or attach are before the Court or have already recognized complainant's rights. At all events the broad equitable principle that the holder of the bare legal title can be compelled to convey to the owner of the equitable estate prevails in Georgia and Tennessee.

We are of opinion that the learned Chancellor should also have enjoined Sadd from prosecuting his suit in Georgia, especially in view of the offers made by the complainant to confess judgment and guarantee payment in case he lost his contentions. That the Courts of this state may in certain circumstances enjoin suits in other states is clearly established. This is especially so with respect to suits that are instituted in another state after litigation started here involving the same subject matter. No harm can be done in restraining the foreign suit, especially when complainant offers to suffer judgment summarily if it turns out that he is wrong.

The rule is that the Court which first obtains jurisdiction of a controversy is to be permitted to decide all related questions; and it is not different when the subject matter is in a foreign state, provided of course the Court of the state of first suit reaches the parties and may law-

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fully deal with the questions. Especially should suit in the foreign state be restrained when there is a suggestion of a desire to evade the consequences of the suit in the enjoining Court.

The decree of the Chancellor is reversed and the cause is remanded with directions to require answers to all bills.

L. E. DRIVER, ADMINISTRATOR V. FRED ARN AND
MRS. NITA CARD.

Affirmed by Supreme Court, 1916.

1. DEATH BY WRONGFUL ACT. *Mistreatment of wife by deceased husband. Copy of bill of divorce filed by wife.*

In a suit by an administrator for the wrongful killing of a husband, it is incompetent to show that the husband had mistreated the wife and that the latter had filed a bill for divorce against him, although he had no children and the wife was sole beneficiary. The wife was notwithstanding entitled to the pecuniary value of her husband's life. Nor was the copy of the divorce bill competent at any rate.

2. AUTOMOBILES. *Duty of, as to persons alighting from a street car.*

It is the duty of the operator of an automobile following a street car to exercise care and caution to the end that parties alighting from those street cars be given an opportunity to reach the curb. It is negligence for such operator to pass a standing street car at a high rate of speed at such time or to pass at all if by so doing those alighting from or getting upon street cars will be imperilled.

3. AUTOMOBILES. *Duty of pedestrian or party alighting from car.*

While a person stepping from a street car must exercise reasonable care for his safety, he is not required to look in all directions for approaching automobiles.

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4. VERDICTS. *Special as controlling general verdict. Erroneous instructions.*

A special verdict to the effect that the deceased was guilty of proximate contributory negligence will not control a general verdict convicting the defendant of negligence where the Court gave erroneous instructions as to the degree of care which the deceased was required to exercise.

5. ABATEMENT OF ACTIONS. *Death after suit brought.*

An action for wrongful death does not abate by the death of the wrongdoer after suit brought. *Aliter*, if death occurs before suit.

FROM HAMILTON COUNTY.

Appeal in error from Circuit Court of Hamilton County, NATHAN BACHMAN, Judge.

W. B. MILLER for plaintiff in error.

FLOYD ESTILL and THOMPSON, WILLIAMS & THOMPSON for defendant in error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

Plaintiff in error Driver as the administrator of John P. Driver, deceased, brought this suit against one J. M. Card to recover damages for the alleged wrongful killing of his intestate in a collision with an automobile owned by Card and operated at the time by his servant. He predicated his right of action upon common law negligence, the violation of our 1905 Act regulating automobiles, and also upon sections 1601 and 1609 of Shannon's Code, embodying the law of the road.

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There was a trial in the Circuit Court which resulted in a verdict and judgment in favor of the defendants, who are the personal representatives of Card, he having died after summons and before trial, and the cause revived against them. Plaintiff below entered a motion for a new trial which was overruled. He has appealed and assigned errors.

A brief reference to the facts or rather to those things which the evidence tended to show will suffice as a preliminary to a discussion of the legal questions arising. Driver was on a Sunday afternoon a passenger upon a streetcar going out the Rossville Boulevard. His destination was at a point beyond the city limits of Chattanooga, and at a place which was wide and free of buildings or obstructions. When he reached his destination he alighted from the rear part and right side of the car, and was proceeding toward the curb when a car owned by Card and operated by his servant and in which Card was riding collided with him, pushing him down and injuring him in such a way as that he died a short time after the accident. The car had stopped at its usual place for the reception and discharge of passengers. It was in the day time and upon a bright day. There is some controversy as to whether he had taken two or more steps after leaving the car; and it is also a dispute as to whether he staggered in front of the car or was walking in the usual way. But there is no room for disputing the fact that he had just alighted from the car and had not had time to reach the curb or to get away from the stopping point when he was struck by the machine. It was going in the same direction as the streetcar, but whether it was following upon the streetcar track or was on the side of the track is not clearly shown. At all events it was going in the same direction as the streetcar and was a very few feet in the rear when the car stopped and when Driver alighted.

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The most hotly contested question in the lawsuit was as to the speed of the automobile. We shall content ourselves with stating that there was a great deal of evidence to the effect that the machine was running at a speed of twenty to thirty miles an hour; and this suffices for us. There was also a dispute as to whether there was any sounding of gong or the checking of speed of the car or anything done to prevent collision.

There is no direct evidence that Driver did or did not look the one way or the other for approaching cars when he stepped upon the street. It may be assumed however that he did not keep a vigilant lookout and on the alert before taking any step. But we reserve for later treatment his duty in this regard.

The first assignment of error is that the Court made an order upon the widow of John Driver to produce a copy of an alleged divorce bill filed by her in the Courts of Ohio. The third assignment is that the Court permitted defendants below to read said document to the jury. We are of opinion that there is merit in these two assignments. It is true that Mrs. Driver, the widow, was the beneficiary of the suit, her husband having no children. But this did not change the form of the action. It was still the action of the husband brought by his administrator to recover the pecuniary value of his life. Whether Driver loved his wife or was mean to her were not strictly pertinent issues: *Davidson v. Severson*, 109 Tenn., 572; *Hegie v. Barley*, 5 Higgins, 79. Moreover, the wife might have relented or wrongfully charged her husband.

In addition to all this, the document had no internal evidence of genuineness, it having no certificate and nothing to indicate its authenticity. Nor do we think that these objections were obviated by the filing of a document pursuant to an order of the Court. The order of the Court

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in the first place was erroneous; and the subsequent filing of a document did not give it validity.

The predicate of the fourth assignment was the withdrawing of the second count of the declaration from the jury upon the ground that it was not applicable. The chief averment of this count was that Card had turned his automobile to the right instead of to the left as required by the law of the road. We are of opinion that the Code sections referred to have no application to streetcars or vehicles that run on a fixed groove or track and that there was no error in the Circuit Judge declining to submit that issue to the jury.

In assignment number five it is said that the Court erroneously instructed the jury that if they reached the conclusion that Card or his agent was guilty of negligence, and that they also believed that deceased was guilty of negligence in bringing about the injury as a proximate cause, that is, that both were guilty of negligence producing the injury, there could be no recovery. The criticism of the instruction is that it ignores the contention of Driver that Card's machine was going at an unlawful rate of speed, thus taking away the plea of contributory negligence upon the part of the traveller.

This instruction was correct as far as it went. In other words, it laid down ordinarily a sound proposition of law. If the parties desired additional instructions setting forth the exception from the rule wrought when a party is violating a plain statute, there should have been a special request. The general rule is that contributory negligence may defeat an action predicated upon the violation of a statute: *Charles Ludke v. Burke*, 56 L.R. A. (N. S.), 968 and note. But there are exceptions to this rule. For instance if a statute is of a criminal nature or is passed peculiarly as a police measure, then contributory negligence

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may not be a bar. Again, we apprehend that our automobile statute should be assimilated to that of our statutory precautions. It will be recalled that contributory negligence defeating recovery was the result of judicial interpretation. We think it manifest that the Legislature made virtually the same provision by implication in the automobile statute, and that upon proper construction it must be held that a party violating the plain provisions of the statute must answer for all damages occasioned thereby. Moreover, a party violating the provisions of this statute is guilty of wilful misconduct and gross negligence. If so, the plea of contributory negligence will never avail.

In assignment number six it is asserted that the Court erroneously instructed the jury as follows: "If by the exercise of his sense of sight when he alighted from the car Driver could by looking have ascertained the approach of this automobile and could have avoided a collision and he failed to do that, and that contributed to his injury or brought about the injury, then he would not be entitled to recover."

We are of opinion that this was an erroneous instruction. The only interpretation which can be given the excerpt quoted is that if Driver could have looked in any direction and discovered the approaching car he should have done so. We are of opinion that there is no absolute duty upon the part of anyone at street intersections or even at other places to keep a vigilant lookout for automobiles. At least it can never be laid down as a rule of law that the traveller must do so at the peril of his right of action in case he is injured. Again, the jury were warranted in construing this instruction as making it the duty of Driver to look to the right, to the left, before and aft, for machines. The only measure to be applied to the conduct of Driver was that of ordinary care under the cir-

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cumstances; and it was for the jury to determine whether or not he acted as an ordinarily prudent man: *Leach v. Asman*, 130 Tenn., 510; *McNabb v. Gannaway*, 3 Higgins, 78; *Peete v. Jackson*, 4 Higgins, 681. See also cases mentioned in those decisions.

That instruction was particularly erroneous in view of the circumstances surrounding this accident. Driver had the right to assume while alighting from the car and after reaching the ground that those approaching from the rear would themselves exercise ordinary care, such as anticipating that passengers were alighting and putting their machines under control, upon the assumption that the street surface would be occupied by people getting out of the streetcar. If he had this right, there was then no absolute duty to keep his eye turned in all directions for automobiles. If as a matter of course Driver did not act as a reasonably prudent man then there can be no recovery. But it was for the jury and not for the Court to convict him of negligence.

The eighth assignment of error is predicated upon an alleged refusal of the Court to give in charge a special request. But this request is not copied in the assignments of error or brief: *Insurance Co. v. Ford*, 20 Pick., 533.

But because of the errors indicated we are of opinion that the case should be reversed and remanded for a new trial. We are not at all satisfied that justice was reached in this controversy and this is an additional reason why we attach importance to the errors indicated.

It is urged by learned counsel for appellee that the special findings of the jury, particularly one to the effect that the accident was caused by Driver's own negligence, should be accepted as conclusive and terminative of the lawsuit at all hazards. It is true that the jury did so report; and the jury also found that the car was going at a

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moderate rate of speed.. But we are persuaded that this finding was against the greater weight of the evidence. In fact, there is room for the contention that there was an absolute breach of duty upon the part of Card in not slowing his automobile at the time the streetcar stopped so as to have allowed Driver to get out of the danger zone.

While it is not our province to weigh the evidence, at the same time it is a very appropriate thing to do when errors which may account for the verdict are pointed out.

There can be no disputing the fact that the jury were impressed by the alleged divorce bill of his wife that Driver was a bad character; and the right to run over him and maim him was demonstrated when it was discovered that he had a bottle of liquor on his person. Again, the Court told the jury that it was negligence for Driver to have failed to look alertly for automobiles. It can be readily seen that a jury which accepted this as a definition of duty would find a traveller who failed to do so guilty of negligence such as brought about the injury. Hence, the reason of the response to the issue as to contributory negligence.

It is next urged by very learned counsel that this action abated by the death of Card before judgment. We find ourselves unable to concur in this view. It is ably presented, but we are of opinion that this is contrary to the accepted rule in this state. We believe that our Code section providing for the survival of all actions not affecting the character of the parties saves this right of action. This plainly for the reason that the cause of the action, that is the wrongful death of the party, certainly lives: *Burnett v. Layman*, 130 Tenn., 423. It is true that if the wrongdoer dies before suit brought the right to sue abates. But it is equally plain that if action has been started, it may continue notwithstanding the death of the defendant, un-

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less it affect the character of the parties: *Hullett v. Baker*, 101 Tenn., 689, and cases cited for the purpose of showing the prevailing opinions upon the subject.

The judgment is reversed and the cause remanded for a new trial. Defendants in error will pay the cost of the appeal.

FANNIE A. EVERETT v. MRS. MARGARET MICKLER.

Affirmed by the Supreme Court, 1910.

1. WILL CONTEST. *Estoppel of legatee by acceptance of legacy.*

A legatee who has knowledge of the main facts surrounding the execution of a will is estopped to wage a contest after acceptance and retention of a legacy given by the instrument.

2. SAME. *Retention of legacy.*

While in some instances a legatee accepting a legacy in ignorance of the facts may not be estopped to contest a will, the contest cannot be waged so long as the legacy be retained.

3. SAME. *Status quo.*

Nor can such legatee contest the will after acquiescence until he restores as near as maybe the status quo.

4. RES JUDICATA. *Validity of will.*

Where in a land proceeding it has been deliberately adjudged that a will, a link in the title of one of the parties, was a valid instrument, the parties will be afterwards estopped to assert otherwise. And this is so although the question was

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not litigated and arose in a chancery proceeding. For the validity of a will may be inquired to in the Chancery Court by appropriate steps in certain proceedings.

FROM HAMILTON COUNTY.

Appeal in error from the Circuit Court of Hamilton County, NATHAN BACHMAN, Judge.

W. B. MILLER for plaintiff in error.

SIZER, CHAMBLISS & CHAMBLISS for defendant in error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

As this cause now stands it is a petition filed by Mrs. Everett praying that the probate in common form of the will of Mrs. Helen Phillips in the County Court of Hamilton County in 1908 be set aside and that it be certified to the Circuit Court for an issued *devisavi vel non*. This petition was filed on the 19th day of August, 1915. The devisee and administrator of the husband of Mrs. Phillips were made parties defendant. They resisted the right of Mrs. Everett to wage the contest of the will of her sister upon several matters or grounds to be hereinafter mentioned.

As is well understood, the right to contest is itself a separate controversy which must be disposed of. The question as to whether petitioner could contest finally reached the Circuit Court, where the points arising were tried by Judge Bachman and a jury. At the conclusion of the introduction of the evidence the Court sustained the motion of the defendants to dismiss the petition, with the result that Mrs. Everett was denied the right to contest

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She has appealed and assigned errors. The several facts and steps pertinent to the questions of law raised will be stated in connection with the discussions of the legal problems. It was admitted that Helen J. Phillips, the wife of R. N. Phillips, deceased, had in 1908 made a will disposing of a good sum of money and considerable personal property to various parties and devising her real estate to her husband absolutely. She had no children. Phillips was named as executor and propounded the will for probate within a few weeks after the death of his wife. It was shown that he took complete charge of the property devised and carried out to the letter all the directions given by the testatrix, including numerous bequests to the children and nieces and nephews of Mrs. Everett, and some things for herself. Phillips lived until the early part of the year 1914, when he died leaving a will in which defendant Margaret Mickler was named as executrix and sole beneficiary. This will was contested and the matter is recited to have been pending at the time this controversy was brought to an issue. Soon after the will of Phillips was offered for probate the present petition was filed.

The defendants urged three substantial reasons why Mrs. Everett should not be permitted to contest. We have concluded that the best way to treat of these matters is to handle them separately. We lay aside as of no importance the other contentions than the three which we shall discuss. First in importance is the statement that under item 13 of the will of Mrs. Phillips, the instrument which she is assailing upon the ground of fraud and undue influence, Mrs. Everett was given three oriental rugs, that these rugs were received by Mrs. Everett as a bequest under the will, and that she had retained them ever since.

The facts bear out this insistence. It was developed upon the trial that soon after the will was probated Phil-

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lips delivered the rugs to Mrs. Everett and that she took them to her home and claimed them and had them in her possession at the time she filed her petition. Their value is not shown, but the presumption is that it was considerable.

There can be no doubt of the effect of the acceptance of a bequest upon the part of the legatee and retention thereof by him or her. And the soundness of the rule could not be augmented by elaborate argument and ample citation of authority. It is unthinkable that an object of a testator's bounty may receive a gift bestowed by his will and yet aver that there was no such document or that the testator did not have capacity. As is quaintly said in *Douglas v. Umphelby*, 3 British Ruling Cases, 517, it is against equity and intolerable for anyone to claim under and against a will, and that this rule simply enjoins honesty and fair dealing.

To the same effect and in entire accord are all the Tennessee cases which have dealt with the subject: *Williams v. Williams*, 15 Lea, 438; *Bowers v. McGavock*, 114 Tenn., 452; *Woods v. Shelton*, 126 Tenn., 607. This rule is founded in plain, almost inexorable logic. A party who takes under a will affirms its existence and validity. See also *Utermehle v. Norment*, 197 U. S., 40, 49 Law Ed., 655; *Madison v. Lorman*, 170 Ill., 65, 62 Am. S. R., 356.

Learned counsel for appellant contends that the case of *Holt v. Rice*, 54 N. H., 398, 20 Am. R., 138, is a decision to the contrary of those above cited and that it is more nearly in accord with the principles obtaining in Tennessee and that it should be used as a guide. We have carefully examined the opinion and find that it is distinguishable from those seeming in conflict. It is true that the right of a beneficiary under a will to return a legacy and institute a contest is recognized; and as for that mat-

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ter this would doubtless be held to be the rule in Tennessee under certain circumstances, such as acceptance under a mistake or because of importunity or imposition. But we cannot consider the decision as authority for the proposition that a legatee who accepts a valuable bequest and holds it for years with actual or constructive knowledge of all the facts and without fraud or imposition can after a great length of time repudiate the bequest and institute a contest. In fact the doctrine of estoppel is clearly recognized. Again, all those cases and authorities similar to *Holt v. Rice* have the further condition that the legatee accepts property to which he would be entitled in case of intestacy. But this is not so when but for the will the articles bequeathed would pass to another. Such is the case here. In the absence of the will Phillips would have taken everything of a personal nature.

It was demonstrated that all parties assumed that the will of Mrs. Phillips was valid and lived up to it and in accordance with it for years, and that the husband expended vast sums of money and delivered many articles of personalty in paying the bequests, all with the knowledge and acquiescence of Mrs. Everett.

The basic reason for an estoppel is the inability of parties invoking it to recover their losses or to be restored to their former condition. It is beyond possibility for the estate of Phillips to be reimbursed for the losses that would be sustained by him if the will of his wife should be held an invalid instrument. For this additional reason we think Mrs. Everett estopped to contest the will of her sister: *Stone v. Cook*, 179 Missouri, 534, 64 L. R. A., 287. It was decided in the case just mentioned that a party who had accepted under a will could not bring a contest if the acceptance had influenced the conduct of others to such an extent as that there could not be a resto-

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ration to former conditions and a reimbursement of losses which would result in case of annulment of the will.

The decision immediately above cited supports another and opposite rule, and that is that no legatee may wage a contest while retaining the legacy received. Mrs. Everett made no tender of her legacy in her petition, and in fact the offer made by her in her replication is weak and qualified. It is not an emphatic surrender of the bequest nor any sort of manifestation of a willingness to relinquish her claims to the rugs except upon the annulment of the will of her sister. We are of opinion that a legatee in this plight occupies an inconsistent position; in which case she can assert no right in either respect in a Court of Justice.

It is urged by able counsel that Mrs. Everett became aware of the facts upon which she predicates her right to contest only a short time before she instituted this suit. There is a summary statement to this effect in the record. While on the surface it seems that some few things that were new were communicated, we are persuaded that one conclusion only can be drawn from the admissions of Mrs. Everett, namely, that she knew or had reason to know substantially every fact or circumstance surrounding the capacity of her sister to make a will, and also the extent to which she was under the influence of her husband from the first, and that time never brought to light any material circumstance different from that of which she was cognizant. She knew all about the sister's intention of making a will, and she was certainly familiar with the sister's ways of thought and her wishes and feelings toward her husband and also her mental condition. Time could not add to this source of information.

But if we should treat her contention as debatable and therefore a question for the jury, there remain the two in-

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superable barriers of change of situation and influencing of the conduct of Phillips, and the retention of the property bequeathed. Ignorance of a few facts is no answer to the rights predicated upon the two features above named. It was her duty if the will was executed under circumstances of suspicion, as she admits she thought very shortly after the death of her sister, it was her duty to assail the document with reasonable promptness.

One of the marked improvements in jurisprudence is the extension of the doctrine of estoppel and its application by Courts of law as in Courts of equity. Times and conditions demand this. People are justified in acting upon appearances; and if rights have been fixed, conduct influenced and habits formed by exteriors, Courts should repel anyone who was a material contributor thereto who would disturb conditions by a revelation of the truth.

This is not a question of the statute of limitations. It must be admitted that will contests may be waged almost without limit of time. But parties may by conduct of brief duration estop themselves to assail a will.

Another ground of estoppel urged was that Mrs. Everett had in a sworn answer filed in an equity cause a few months after the death of Mrs. Phillips admitted that she died testate and that her husband was the owner of an interest in real estate as her devisee. A few months after the death of Mrs. Phillips Phillips filed a bill in the Chancery Court against Mrs. Everett and others seeking a partition of real estate in Chattanooga. In his bill he averred that he was the owner of an interest therein as the devisee of his wife. Mrs. Everett swore in her answer that this averment was true. She now seeks to avoid the effect of that admission by stating that it was made inadvertently and inconsiderately and upon the advice or at the direction of her counsel. Owing to the fact that Phillips

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would have had no interest in the property except as devisee of the wife, and owing to the fact that the estate was valuable, no other conclusion can be deduced from the circumstances than that Mrs. Everett well knew that Phillips had asserted in his bill the existence of the will of his wife, and that this averment had to be dealt with as a necessary part of the litigation. We cannot be persuaded to believe that Mrs. Everett did not know what she was doing when she made the sworn statement.

But whether her contention in this respect be accepted or rejected, the defense of *res adjudicata* is applicable and controlling. It was adjudged in that case by at least two decrees or orders that Mrs. Phillips had died testate and that her husband was her devisee. We see no reason why Mrs. Everett should not be held bound by those adjudications.

It is urged by able counsel that it was not an issue in the case and that the decree was not a binding adjudication. We feel constrained to differ from the learned attorney. While the question was not litigated, it was the keystone of Phillips' claim and standing in Court. It therefore became incumbent upon parties who did not believe that the title of Phillips was valid to challenge his right in that litigation. It is no sufficient answer to say that a Chancery Court could not try a will contest. The rule is universal that when a party avers in a Court of law or a Court of equity that he has certain claims by virtue of the existence of a will, his right may be challenged by a denial of the existence or the validity of the will. The rule in this state is that when a party avers in his pleading with respect to real estate that he is the owner by will of an interest therein, the defendant may assert the invalidity of the will and have an issue to this effect made up and tried: *Weatherhead v. Sewell*, 9 Humph., 271; *Brown v. Brown*,

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14 Lea, 254; *Greer v. Canada*, 119 Tenn., 17. It is true that in the latter case Judge McAlister says that no will contest can be thus tried. But the case is authority for the proposition that a defendant in possession may challenge the existence of a will and have the question determined in accordance with the old common law practice of sending an issue into a common law Court for trial.

We find nothing in the case of *Harris v. Mason*, 120 Tenn., 668, which is inconsistent with our holding herein. It was there ruled that an issue not *raised and litigated* was not concluded, although it could have been brought forward. (A dangerous doctrine.) But it can never be said that an issue which is distinctly raised and which must be met by admission or denial was not litigated and determined. In the instant case the only issue presented by Phillips was the existence of the will through which he claimed. The conduct of defendants in allowing the case to proceed upon the assumption that the will was valid certainly presents the basis for an estoppel by judgment.

The case of *Greer v. Canada, supra*, is also apropos, in that it was there ruled that an admission by pleading that a will was in existence created an estoppel to assail the will in any subsequent proceeding.

We affirm the judgment of the lower Court. Appellant will pay the costs.

Dick v. Power Co.

J. B. DICK v. TENNESSEE POWER CO.

Affirmed by Supreme Court, 1916.

1. CONDEMNATION. *Necessity of showing title or possession.*

A party seeking to recover the value of lands taken by eminent domain must show title thereto by regular deraignment or show actual possession by him.

2. PLEADING IN PRACTICE. *Peremptory instructions. Reopening case after motion.*

It is discretionary with the Circuit Judge to reopen a case for additional proof where a motion for peremptory instructions has been made.

FROM KNOX COUNTY.

Appeal in error from the Circuit Court of Knox County,
VON A. HUFFAKER, Judge.

J. C. WILBURN for plaintiff in error.

WRIGHT & JONES for defendant in error.

SPECIAL JUSTICE SANSOM delivered the opinion of the Court.

This is an action of damages instituted by the plaintiff Dick against defendant power company, for alleged unlawful entry upon and appropriation of a right of way for the erection and maintenance of poles and wires over, upon and across certain property described in the declaration and alleged to be the property of the plaintiff.

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To the declaration in the case the defendant interposed two pleas. First, the general plea of not guilty and second, it was asserted that the plaintiff Dick was not the owner of the property appropriated, and really the only serious question in the case arises under this latter plea.

Upon the close of the testimony in the Court below, the Court on defendant's motion instructed the jury to render a verdict in favor of the defendant company. To this action of the Court the plaintiff excepted and entered a motion for a new trial based upon two grounds. "A." Error of the Court in instructing the jury to return a verdict in favor of defendant, and "B," Error of the Court in overruling and disallowing the motion of plaintiff by his attorney "to be allowed to reopen the case and introduce proof to more specifically prove actual possession of the property at the time of the alleged trespass." This motion being made after defendant had entered its motion directing a verdict in its favor, but before the Court had passed upon it.

Addressing ourselves to the first ground of the motion for a new trial and error assigned thereon, we think that this case falls distinctly and clearly within the rule announced by the Supreme Court of this state in the case of *Railway Light Co. v. O'Fallen* as reported in 3 Thompson at page 270 *et seq.* This holding is clear and distinct that in case of this character there must be shown either title or actual possession of the property, and that to show title means that the chain of title must be introduced with all its links, extending back to the state. In the absence of the title thus established he must prove actual possession at the time the land was entered upon, and in the case under consideration the plaintiff in error did not meet either of the mandatory requirements, and the Court was right in peremptorily instructing the jury in favor of the defendant

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company, and as a result the first assignment of error must be and is overruled.

We are further of opinion that the second ground of error relied upon constitutes no basis for reversal in this case, for two reasons. First, the action of the Court in reference to this motion was in the exercise of that discretion with which he was vested, he had all the parties before him in person and knew all the facts and circumstances surrounding the case and attendant upon its trial, as well as the preceding steps in the case, and having these matters all before him he exercised his discretion along that line in determining the motion, and we see no abuse of that discretion, and are therefore unwilling to reverse upon that ground. In the second place the motion fails to disclose, so far as this record is concerned, that plaintiff could have proved any fact not already in the record. There is no affidavit nor is there any sort of distinct statement of any material fact that could have been established, other than those already established that would constitute any predicate from which any different result might be reached than that already had, and for this reason the motion is not well founded, and this assignment of error is likewise overruled. The result is there is no error in the judgment of the Court and it is affirmed with costs.

Cochran, Nass and Freed v. McGuire.

A. C. COCHRAN, E. B. COCHRAN, JACOB NASS AND C. S.
FREED, A CO-PARTNERSHIP DOING BUSINESS AS THE
EAST TENNESSEE BREWING COMPANY
v. ROGER MCGUIRE.

BUYER AND SELLER. *Lessor and lessee. Of property to be used for illegal purposes.*

A seller of saloon furniture and equipment who makes the trade for the specific purpose of enabling the buyer to carry on an illegal liquor business cannot recover the purchase price, especially where one of the stipulations of the bargain was that the purchaser was to become a customer of the seller with respect to his liquid goods.

FROM KNOX COUNTY.

Appealed from the Chancery Court of Knox County.
WILL D. WRIGHT, Chancellor.

MALCOLM McDERMOTT for complainant.

CATES & PRICE for defendant.

SPECIAL JUSTICE SANSOM delivered the opinion of the court.

The bill in this cause is filed by complainants against defendant alleging an indebtedness upon his part to them in the sum of \$618.71, due by account for goods, wares and merchandise, sold and delivered him. The defendant answered the bill denying liability to complainants in the sum sued for, or any other amount, denying that he purchased the goods alleged, or became indebted to complain-

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ants therefor. Defendant further says in his answer that the complainants were engaged in the manufacture of a certain intoxicating liquor commonly known and called beer, and that he, defendant, had engaged in operating a saloon in Knoxville; that complainants in order to induce and equip the defendant for running another saloon in the Colonial Hotel in Knoxville, in addition to one he was then operating in the Atkin Hotel, furnished and loaned him certain bar fixtures and saloon paraphernalia covered by some of the items in the account sued on; that these fixtures and paraphernalia were so furnished by the complainants for the purpose of equipping the saloon to be operated by the defendant who was to sell therein certain intoxicating liquors commonly known as beer, and that said saloon fixtures and paraphernalia were furnished by complainants to defendant upon condition that he, the defendant, should handle and sell in the saloon to be so furnished and equipped, and should give preference the handling and sale, and should purchase from complainant to that end, the beer manufactured by complainant, and that the defendant agreed to this and did do so, until the saloon was closed by operation of law.

Proof was taken by both parties and the case was heard before the Chancellor who upon the 9th day of May, 1916, pronounced a decree adjudging that complainants were not entitled to recovery of defendant the amount sued for. The Court further held that the weight of the proof showed that the complainants made sale of the fixtures to the defendant as alleged in the bill, but that the contract was an unlawful one and therefore complainants were not entitled to any recovery. The Chancellor accordingly dismissed the bill at the cost of complainants and from this decree an appeal was prayed and prosecuted to this Court.

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Taking up now the complainant's assignment of error, which is in these words:

"The learned Chancellor erred in holding that the contract of sale sued on in this cause was an illegal transaction and in dismissing complainant's suit, because such action is contrary to the law and the evidence."

This assignment of error constitutes the battle ground in this litigation, and is practically the only question of moment for consideration and determination by the Court in the case. Under the record it is clear that the defendant McGuire had been in the saloon business for a period of ten or fifteen years prior to the summer and fall of 1913, the date when the transaction in question took place. It appears that complainants had been engaged in the manufacture and sale of beer for quite a number of years, being interested in and practically the owners of the East Tennessee Brewing Company, a corporation whose assets and properties had been administered, and its charter forfeited under a proceeding by the state some years ago, and after this forfeiture that the complainants had continued the business of the East Tennessee Brewing Company under the name and style of East Tennessee Brewing Company Unincorporated, through a trust arrangement as between themselves in respect to the holdings and operations. It further appears that the defendant McGuire had first begun the saloon business on Market Square in the City of Knoxville prior to the legislative enactment inhibiting the sale of intoxicants in Tennessee, and that upon his opening up his saloon the complainants had furnished to him, not by sale, but for his use, free of charge, the furniture, fixtures and appliances necessary for the proper equipment of his saloon business, and in consideration therefor the defendant gave to the product of the complainant, and especially to the draft product, the preference in

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sale in his establishment. Subsequently the defendant went out of business on Market Square and opened a saloon in the Hotel Atkin in Knoxville, and the same transaction occurred there as between complainants and defendant McGuire, the furnishing by complainants to defendant of the fixtures and appliances necessary and proper for the operation of the saloon and which were used therein, the same having been furnished not by way of sale but for use merely, the ownership remaining in the complainants. It further appears that later on and when the holding of an exposition was being contemplated in Knoxville, an arrangement was entered into mutually as between complainants and defendant, by the terms of which the defendant was to open up a cafe and saloon in the basement of the Hotel Atkin for the purpose of supplying the trade in eatables and drinkables during the period of the exposition, and to that end the complainants ordered the paraphernalia and appliances necessary for the equipment of this saloon, which were to reach Knoxville by a given date. The record showing, however, that while this paraphernalia was shipped to Knoxville to the complainant East Tennessee Brewing Company, it did not reach Knoxville by the date fixed, and agreed upon, and came too late to be of service in the opening up of the cafe contemplated for exposition purposes, so that the outfit was not used but was returned to the seller without having been uncrated, and one or two items charged on the account sued on in this cause, perhaps covers freight both ways on this shipment. It is proper to say defendant denies that he purchased or agreed to purchase these appliances, while complainants insist this transaction was sale and purchase and not a furnishing free.

It further appears that perhaps in the summer of 1913 the defendant, still engaged in the operation of his saloon

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business in the Hotel Atkin, using the fixtures and appliances furnished him by the complainants, and the ownership of which fixtures and appliances was in the complainants, the defendant conceived the idea of opening up another saloon in the Colonial Hotel in the city and made arrangements therefor, rented a room in the Colonial Hotel for that purpose; that he and one of the complainants went to the Colonial Hotel and made measurements, etc., the complainant E. B. Cochran making the measurements for the equipment necessary to be installed for saloon purposes, and pursuant to these measurements the paraphernalia in suit was purchased and installed. The insistence of complainants is that they purchased the fixtures and paraphernalia for the defendant, giving him the 25 per cent discount accorded to brewers and that was not accorded to the trade, saloon keepers, generally, and that the defendant could not secure the benefit of except through the brewers. The question has already been passed upon in the case that this was a sale by the complainants to defendant of these fixtures and paraphernalia, so that we shall not further take up that question it having already been disposed of.

We have now to determine whether or not the complainants have a right in law to recover from the defendant in this action the amount and value of this sale and purchase. The principal articles composing the illegal sale and purchase were a saloon counter, saloon rail and wall mirror. These articles in and of themselves were not such articles as that their sale and purchase were inhibited, they could have been used readily for the sale of soft drinks, etc., and we should go further and state that the mere *knowledge* on the part of complainants of the illegal purpose to which the defendant intended to apply the articles would not be enough in and of themselves to implicate the com-

plainants in guilty participation in the illegal act. The proof must go further in the opinion of this Court and show that the complainants made this sale to the defendant with the purpose of contributing to the purchaser's intention to engage in and uputilize these fixtures and appliances in the illegal sale of intoxicants. It is apparent from the record that saloons were being operated in Knoxville at that time in open and flagrant violation of law, and that during the early part of October of that year, 1913, the law officers of Knox County and Knoxville closed these saloons, and that at the date of this closing this saloon of defendant McGuire, for which the appliances and fixtures in question were bought and installed, had only been in operation about eighteen to twenty days when so closed. The rule of law applicable has been recently decided by the Supreme Court of this state in the case of *Bank of Commerce & Trust Co. v. Burke, et al.*, reported in the advance sheets of the Southwestern Reporter and number 185 at page 704. It is true that this case has reference to the leasing of a building. It is a suit by the landlord seeking to recover rent of the tenant under a lease. It appears in that case that at the time the lease was entered into the prohibition law was in effect and that it was leased as a "store house," but was equipped with all the paraphernalia and appliances requisite for the saloon business, it was being operated as a saloon and had been for twenty years prior to that time, and the Court's holding is that although the lease on its face showed no illegal intent of use, yet that the lessor knowing and intending at the time of the contract to lease the property for an illegal purpose, the conducting of a saloon, such knowledge and intent was in furtherance of an illegal purpose and he could not recover: *Bank v. Burke*, 185 S. W., 704, and this case is followed by another appearing in the

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same volume of the Southwestern, reported at page 1074, the opinion in which was delivered by Mr. Justice Williams, in which the Court holds that mere knowledge on the part of the seller of intoxicating liquors, that the buyer intends to illegally resell the liquors will not render the contract of sale void so as to bar the seller's action for the purchase price, but that if the seller participates in or contributes to the purchaser's intention to sell the liquors and does any act to facilitate or further the design on the part of the purchaser to transgress the law, or has any interest in the sale then the right to recover for the sale thus made is lost, and numerous authorities are cited to sustain this doctrine, which is not only salutary but thoroughly sound as we think in law, logic and morals. The question in the instant case is, did the sellers participate in or contribute to the intention of the purchaser to use the fixtures and appliances in question in violation of law, or did they do any act however slight to facilitate or in furtherance of the design to transgress the law, or did they have any interest in the transgression of the law contemplated and proposed. For the determination of this question we must look to the facts.

The complainant E. B. Cochran upon his examination was asked if he knew at the time complainants were selling these fixtures and appliances to defendant that some of the beer manufactured by the complainants was intoxicating, and his answer is "I presume it was." He is then asked if when he ordered these appliances for the defendant he knew that McGuire was going to purchase beer manufactured by the complainants, and he says, "I presumed he would but he was not *bound* to do it." It is perfectly clear from this record that these complainants knew that the beer that they were selling was an intoxicant. It is further apparent to the mind of this Court,

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from a reading of this record, that their purpose in purchasing for and selling these fixtures and appliances to the defendant was that they might be used in his saloon business being openly operated in violation of law. The record shows that the defendant stated to the complainants that he wanted to *buy* these fixtures and furniture and did not want them installed by the complainants free, because if they were installed by the complainants themselves as owners that he would then have to give preference to their beer, and that he did not want to be bound down in any such way, he wanted to buy the fixtures and sell anybody's beer without being under obligations. A. C. Cochran, one of the complainants, says McGuire told him that he did not want to bind himself to give preference to the sale of complainants' beer because it was *too weak*. E. B. Cochran says that the product manufactured by the complainants was intoxicating, now under these circumstances the conclusion cannot be escaped but that complainants knew that this defendant had been engaged in the sale of intoxicants and was at the time of this alleged transaction engaged in the sale of intoxicants, the operating of a saloon in Knoxville in open violation of law. It cannot be otherwise than that they were aware of the fact and purposely participated therein and furthered the object of this illegal sale by buying for and selling these fixtures and appliances to the defendant for saloon purposes, and thus they were participants in the wrong, and we cannot question under the record that they were interested in the business to the extent of the profits on the sale by the complainants to the defendant of their beer products, and this is made clear by the fact that they did sell to the defendant after these fixtures and appliances were furnished and sold him over two hundred dozen bottles of beer. True that this sale was not made direct by complainants to the de-

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fendant, but it was made to the defendant by the Tennessee Beverage Company, the Kentucky general agent for the complainants in the sales of their beer. The method of dealing being that the complainants shipped all their product out of the state and it was sold without the state under the Interstate Commerce rules, and thus an effort made to keep the transaction within the pale of the law.

In the opinion of this Court there was no error in the decree of the Chancellor in this case, and it is affirmed with costs.

ELIAS HALL v. RHODA HALL.

HUSBAND AND WIFE. *Tenants by entirety. Effect of divorce. Right of husband.*

Where husband and wife own lands by entireties an absolute divorce will convert them into tenants in common, changing the interest of the wife to that of a general estate; and if the husband procures a divorce because of the wife's adultery, he is entitled to rents and profits of the wife's half during the remainder of his life.

FROM KNOX COUNTY.

Appealed from the Circuit Court of Knox County, Von A. HUFFAKER, Judge.

W. L. MEYERHOFF for complainant.

NOBLE SMITHSON for defendant.

SPECIAL JUSTICE SANSOM delivered the opinion of the Court.

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The question to be determined in this case is what, if any, rights, title or interest the husband becomes entitled to in the wife's real estate, the title to which was held by the husband and wife by entireties prior to their being divorced upon the bill of the husband. The facts are that Elias Hall, the complainant, filed a bill against Rhoda Hall, his wife, alleging infidelity and seeking a divorce upon that ground. A cross bill was filed by the defendant Rhoda Hall in which she sought a decree of divorcement from Elias Hall, her husband upon the grounds. It appears that during the period of their coverture, and on the 21st of April, 1890, there was executed to these parties, Elias Hall and wife Rhoda Hall, a deed by Phillip Hall and wife, Katie Hall, to a tract of land adjacent to the City of Knoxville, containing about ten or eleven acres, the title being vested in them jointly, and they thus taking same by the entirety. One child, a son, was born to them who lives with the mother and is about twenty-one years old.

The case was prepared and upon the hearing the Court granted a decree of divorcement in favor of the complainant Elias Hall and against defendant Rhoda Hall, upon the ground of adultery, and further adjudged that under section 4225 of Shannon's Code, the complainant and defendant being thus vested with the title to said land in entireties as husband and wife, upon the dissolution of the bonds, under the decree they became vested with the title to said property as tenants in common and that the rights and interests of the complainant Elias Hall in and to the rents and profits in the land were not impaired by the dissolution of the marriage relation, but remained the same as though the marriage had continued, except that they were holding as tenants in common instead of by the entireties. And further held and adjudged that under

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section 4225 of Shannon's Code, which is as follows: "When a marriage is dissolved at the suit of the husband and the defendant is owner, in her own right, of lands, his right to, and interest therein, and to the rents and profits of the same, shall not be taken away or impaired by the dissolution, but the same shall remain to him as though the marriage had continued. And he shall also be entitled to her personal estate in possession or in action, and may sue for and recover the same in his own name," the complainant Elias Hall was entitled to the possession of the land and the rents, issues and profits thereof during the remainder of his life, not only the undivided one-half interest owned by him as tenant in common with his divorced wife, but of the undivided interest therein owned by his divorced wife.

A petition was filed by the defendant Rhoda Hall for a rehearing upon that part of the decree thus vesting in the complainant Elias Hall the rents, issues and profits of or arising from her one-half interest in the premises as tenant in common, and the question presented to this Court, as stated, is whether or not the Chancellor erred in this holding. The case of *Hopson v. Fowlkes* reported in 92 Tenn., at page 697 is an ejectment bill growing out of the ownership of certain lands therein adverted to. It appears that this land belonged to one Mary Hopson who was formerly the wife of one James Wilson; that during the period of their coverture the father of said Mary E. conveyed to her and her then husband, James Wilson, jointly, the land in question. Her husband died thereafter and the complainants in the case asserted that the title to the land became vested in the said Mary E. by right of her survivorship, it having been owned by herself and husband by the entirety. It appears that the said Mary E. had been divorced from the said James Wilson in October of 1860,

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and thereafter on the 18th of March, 1861, she intermarried with W. H. Hopson, her then husband. It further appears that in January, 1860, prior to the divorce, which occurred in October, 1860, the land in question was attached by the creditors of her then husband James Wilson, and by proper decrees in the Chancery Court of Dyer County it was sold under the attachment proceedings, when the defendant Fowlkes and one Ledsinger became the purchasers. The insistence in that case in behalf of complainant Hopson was that the defendants Fowlkes and Ledsinger, the purchasers, only acquired such interest in the premises as James Wilson the former husband of Mary E. had in the land, and that the said Wilson having died that Mary E. became entitled to the whole estate by right of survivorship, said Wilson having died in November, 1886. It should not be overlooked that said Mary E. was divorced from her husband James Wilson on the 30th of October, 1860, the insistence of her counsel was that she continued to hold the land in question by entireties with her former husband James Wilson notwithstanding the divorce proceeding. The question was, what effect the granting of the divorce had upon the title to the estate, and the rights of the parties therein, and the holding of the Court was that the effect of the divorce was to constitute the parties tenants in common of the property, instead as formerly and during coverture owners by entireties, and this principle was reannounced by Judge McKinney who delivered the opinion in the case of *Ames v. Norman*, 4 Sneed, 682. Judge McKinney among other things saying: "The law, in destroying the unity of person between them, has, by necessary sequence destroyed the unity of seizing in respect to their joint estate; for independent of the matrimonial union this tenancy cannot exist."

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In the case of *Brassfield v. Brassfield*, 96 Tenn., 12 Pickle, 584, which was a divorce proceeding wherein Emma Brassfield had filed a bill for divorcement against her husband V. G. Brassfield, upon the ground of cruel and inhuman treatment and defendant answered denying the averments of the original bill and seeking by cross action a divorce from the original complainant upon the averment of adultery. Upon the hearing of the original bill it was dismissed, and a divorce was granted the husband as cross complainant; upon the ground of infidelity and giving to him the rents and profits, as well as possession of certain real property, part of the wife's estate, and from that decree the wife appealed and assigned errors. The first error assigned was that the Court erred in granting rents and profits of the tract of land belonging to the wife as a general estate. But the Court in that case, under the statute hereinbefore adverted to, adjudged the rents and profits of the land to the husband upon the ground that it was the wife's general estate, and that the statute expressly authorizes such adjudication.

In the case at bar, while the relation of tenants by entireties existed between the parties to this litigation prior to their divorcement, yet the decree of the divorcement changed that title from an estate by entireties to an estate held by the parties as tenants in common, resultant from the dissolution of the matrimonial bonds. An undivided one-half interest in this property under that decree was owned as a general estate by the defendant Rhoda Hall and owning this land or interest in the land, by the express provision of the statute the husband became entitled to the rents and profits thereof, and there was no error in the decree so adjudging. The result is the decree of the Chancellor must be affirmed.

Railroad Co. v. Toombs.

L. & N. R. R. Co. v. ELIZABETH TOOMBS, ET AL.

Writ of certiorari denied by Supreme Court, 1914.

1. ACCORD AND SATISFACTION. *Claim for personal injuries. Will be set aside, when.*

An accord and satisfaction of the claim of a widow for the wrongful death of her husband will be set aside when it is shown that it was procured immediately after the death of her husband and without an opportunity to investigate, and where the agent representing the wrongdoer informed her that there was no liability and impressed her with the advisability of settling.

2. SAME. *Duty of widow to investigate.*

In such case it is no answer to say that the widow should have investigated her claims before settling.

3. RAILROADS. *Statutory precautions. Question for the jury. Defective eyesight.*

The engineer cannot excuse himself for failing to stop his train or to sound the alarm whistle by stating that the object which turned out to be a man was thought by him to be an ash heap. And whether the misty condition of the atmosphere afforded an excuse, and whether the eyesight of the engineer was defective, and also whether the precaution of sounding the alarm whistle should have been taken, were all questions for the jury.

4. ENGINEER JOINTLY LIABLE.

An engineer by whose negligence a person on the track is run over and killed may be jointly sued with the railway.

FROM HENRY COUNTY.

Appeal in error from the Circuit Court of Henry County, T. N. HARWOOD, Judge.

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W. W. FARABOUGH for plaintiffs in error.

D. B. SWEENEY for defendant in error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

On the 6th day of May, 1910, the husband of defendant in error was run over and killed by a freight train at a point on the railway track of the L. & N. Company, about four miles north of Paris. To recover damages for this alleged wrongful killing this suit was brought. Upon this, the second trial, a verdict and judgment of \$1,000.00 was secured, to reverse which plaintiffs in error prosecute this appeal.

The declaration contains two counts, but the case developed by the proof and the theory upon which it was tried was that it was a statutory precaution case. We shall so treat it. In addition to the plea of the general issue tendered there was one of accord and satisfaction, the replication to which was that the compromise was procured by fraud.

The principal assignment of error here is that there was no material evidence to support the verdict. Under this assignment two contentions, namely, that the proof shows the observance by the employes of the railroad of the statutory precautions and that the settlement was made fairly and honestly, are urged.

This cause was before us upon the appeal of Mrs. Toombs twelve months ago. The Court was of the opinion that the trial judge did not err in declining to submit the case to the jury, our holding being predicated in the main upon the conclusion that the settlement was made fairly and frankly, and that Mrs. Toombs obtained substantially all that she would recover in an untrammelled

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lawsuit. The Supreme Court reversed us and remanded the cause for a new trial. It is our recollection that the record now presented to us is substantially that we had before insofar as the facts are concerned, and we feel constrained to give utterance to our belief that the disputed questions raised by plaintiffs in error under this assignment were virtually foreclosed by the judgment of the Supreme Court. Otherwise it seems that an affirmance would have followed.

But independently of that judgment we have examined the record and have reached the conclusion that upon both phases the questions were determinable by the jury, and that as there is evidence supporting their findings we are not at liberty to disturb their verdict. Briefly, insofar as we are now dealing with the accord and satisfaction, there is evidence tending to show that very soon after the husband was killed an agent of the railway company visited Mrs. Toombs and represented to her that the railroad was not liable, that the employees did everything they could to prevent the accident, that the whistle was blown, and that there was no liability upon the part of the railroad whatever; that the railroad was willing to make her a present of \$150.00, and that he would add \$50.00 himself. The testimony tends to show that he reiterated his assertion of non-liability and appealed to her sense of fairness. It is shown that she was then ill and had not recovered from the shock of her husband's death and relied implicitly upon the representations of the agent. There is proof tending to show that one or two material statements of the agent were untrue. These and other attendant circumstances were sufficient to take the case to the jury.

Respecting the contention that the proof shows no breach of statutory duty it is said that the day on which Toombs was killed was dark and misty, that his body was not dis-

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coverable until within three or four car-lengths of the place where he was lying, that he was lying on the track with his head propped up on a cloth-covered grip and that he was mistaken by the engineer for an ash heap until too late to sound the alarm whistle, and that when it was discovered that the object was a man, every possible means was used to prevent an accident. It is argued that Toombs did not become an obstruction until it could be seen that the object was a man.

It was for the jury to determine whether the excuses for nonobservance offered by plaintiffs in error were valid and sufficient. It was admitted by the engineer that he saw the object some three or four hundred feet before reaching it. Whether he was justified in his assumption that the object was an ash heap instead of a man was for the jury, as was likewise the question as to whether or not the day was so misty as to prevent discernment of objects. The excuse that the engineer was mistaken in his object cannot be looked upon with very great favor: *Railroad Co. v. St. John*, 5 Sneed, 524.

There is evidence tending to show that the eyesight of the engineer was defective. If so, there was liability. The weight of this evidence was for the jury. It is admitted that the alarm whistle was not sounded, it being urged as an excuse that when it was discovered that a man was on the track the engineer did not have time to give the alarm and to use the other methods of preventing collision. Upon all these matters it was the province of the jury to pass. They might well in the first place say that the alarm whistle could have been given almost simultaneously with the taking of other precautions and they might also be of the opinion that the alarm whistle would have been an effectual means of arousing the sleeping or drunken man: *Hill v. Railroad*, 9 Heiskell, 827.

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Altogether we feel constrained to hold that there was some evidence tending to rebut or discredit the contention of the railroad company that it obeyed the statutory precautions. The burden of showing observance or of excuses for non-observance was upon plaintiffs in error. We overrule this assignment of error.

What we have said disposes of the 3rd assignment of error.

In the 4th assignment of error it is said that the Court should have given in charge a special request to the effect that there rested upon the plaintiff below before making a settlement of her claim the duty of investigating the grounds of liability. We are not aware of any rule of law to this effect and no authorities are cited so showing. It seems to us that the question was whether Mrs. Toombs was misled to her prejudice by the design or imposition of the claim agent. In addition, the proof is all one way that his conduct was such as to induce her to rely exclusively upon him. We overrule this assignment of error.

It is assigned as error upon the part of Buford, the engineer, who was also sued, that there is no evidence of misfeasance and that he cannot be held liable for mere non-feasance; that this is a liability for which the master alone must respond. It was held otherwise by us in the case of *Telephone Company v. Stoneking*, 1 Tenn., C. C. A., 241. It was for the jury to determine whether or not Buford was negligent. There is some warrant for the conclusion that he was. If so, he might be held jointly with his master.

We overrule all the assignments of error and affirm the judgment below.

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E. W. CREWS v. D. T. GOULD.

Writ of Certiorari denied by Supreme Court, 1915.

1. **PHYSICIANS AND SURGEONS. *Fees charged to third party. Statute of frauds.***

A surgeon who performs an operation upon a party at the request of a third person, to the latter of whom credit was extended, may recover his fees and charges, and the plea of the statute of frauds will not avail.

2. **STATUTE OF FRAUDS. *Promise by party having funds of beneficiary.***

A promise by a party who has the funds of another in his possession that he will pay surgeons' fees rendered that person may be held personally liable therefor, notwithstanding the promise was not in writing.

3. **SAME. *Subsequent destruction or redelivery of property to person receiving the benefit.***

In such case the subsequent destruction of the property or its redelivery to the person who was treated will not relieve the promissor of his original obligation.

4. **SAME. *Fraud of the beneficiary and his bad character no defense.***

Where a party thus having property in his possession makes a distinct promise to pay and on the faith of which services are rendered, cannot resist the demand of the promisee by showing that the contract by which he, the promissor, obtained possession was tainted with fraud; nor can he defeat recovery by showing that the recipient of treatment was ill because of vicious and immoral habits.

5. **ARGUMENT OF COUNSEL. *Wide discretion. Presumption that counsel desisted. May make reasonable deductions.***

Trial Judges in this State have a wide discretion in the matter of controlling argument of counsel, and their action in restraining or refusing to check will not be reviewed unless

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there be palpable abuse. Counsel have the right to make all reasonable deductions justified by the evidence, and to make personal and temperate comments upon the attitude and upon the motives upon the parties. The presumption is that an attorney whose argument has been reproved by the Court has desisted.

6. SAME. *Objection.*

There must always be an objection to argument of counsel in order to predicate an assignment thereon.

7. SPECIAL REQUESTS.

Where the Circuit Judge upon objection raised has stated that he will instruct the jury with reference to any matter, the party desiring such instructions should specially request the Court to give the matter to the jury when the Court has omitted the same in his general charge.

8. NEW TRIALS. *Confinement to points raised in the lower Court.*

When the mover of a new trial goes into the particular reasons why a new trial should be granted, he will be confined to those specifications of reasons when the case reaches this Court.

FROM LAWRENCE COUNTY.

Appeal in error from the Circuit Court of Lawrence County, W. B. TURNER, Judge.

J. D. BURCH, and CREWS & STARNES for plaintiff in error.

L. B. WHITE for defendant in error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

From a verdict and judgment of \$303.00 recovered in the Circuit Court of Lawrence County, against plaintiff in error, Crews, this appeal is prosecuted. He assigns in

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this Court twenty-two errors and files with them a lengthy brief and argument of learned counsel in their support. We shall dispose of all assignments of error, but not separately nor in the order in which they appear in the record. The last assignment, No. 22, will be treated by us first.

This assignment is that there is no evidence to support the verdict returned by the jury. Gould is a practicing physician of Lawrenceburg and runs in connection with the practice of his profession a hospital in which surgical operations are performed and patients cared for and treated. There is evidence tending to show the following facts and circumstances upon which the jury evidently based their verdict: In February, 1912, one Woden was carried by Dr. Dan Crews, a physician of Ethridge, in good standing and practice, and presumably the family physician of plaintiff in error, to the hospital of Dr. Gould for examination and for treatment. It was soon discovered that he was suffering from six or seven strictures, and that the only means of relief was a skilful operation followed by hospital treatment. Gould was assured by Dr. Crews that plaintiff in error would pay the surgical and hospital bills, as plaintiff in error sustained such relations to Woden as made him morally bound or at least likely to agree to pay these expenses; that Dr. Crews called up plaintiff in error before the operation and informed him of the seriousness of the operation and of its necessity and of the need for hospital treatment, etc.; that Dr. Gould was aware of this conversation over the 'phone and immediately agreed to receive Woden as a patient and operate; that one of the sons of plaintiff in error was present during the operation, and that plaintiff in error visited Woden shortly after the operation and possibly once or twice thereafter; that some weeks after the operation

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Crews in substance stated to Gould that Gould doubtless needed his fees, but that he, plaintiff in error, was not then in condition to pay, but would be able sometime thereafter; that Woden had been ill at the home of Crews for some time before he was taken to the hospital, that his expenses had since 1910 been defrayed by plaintiff in error, and that in the year named Woden had conveyed to him all of his property in consideration of an agreement by Crews to care for him during the remainder of his life, and that at the time Woden went to the hospital this contract was in existence and a part of the property involved in Crews' possession.

We have of course recited that evidence which was most favorable to defendant in error, as we are required by our practice to do. While the evidence is not very cogent, we think it was of such strength as to prove or tend to establish the controlling fact that Gould had performed an operation and extended hospital treatment to Woden solely upon the promise of Crews to pay the charges, credit having been extended to him alone, as Woden had no estate in Tennessee other than his equities in the hands of Crews. The acceptance of this theory by the jury cannot be said to be without supporting evidence, and therefore we must overrule the 22nd assignment of error.

The first assignment of error is that the Court should have required Dr. Gould to state more specifically in his warrant his cause of action. The warrant was the usual one requiring the defendant to answer a plea of debt due by account under \$500.00. This is sufficient, whether on motion for more specific averments or in arrest of judgment: *Nichols v. Turnpike Co.*, 1 Thompson, 541. We are to presume that an account was filed upon the hearing as required by statute, and this clearly furnished all the information needed by plaintiff in error. Again, there was certainly no surprise.

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In the 2nd assignment of error it is said that the Court erroneously permitted Gould to introduce the copy of a contract which had been entered into between Crews and Woden in 1910, whereby Woden conveyed his property to Crews in consideration of an obligation upon the part of Crews thereafter to maintain and support him for the remainder of his life.

The 15th assignment of error is to the effect that the Court refused to exclude from the consideration of the jury the contract just mentioned. The 16th assignment is predicated upon a statement of the Court in its charge that the jury might look to the written contract as throwing light upon the transaction between plaintiff and defendant. All these will be considered together.

A sufficient answer to the contention that the Court improperly admitted the copy of a document instead of the original will be found in the disclosure by the record of the fact that the contract was executed in duplicate and that the document exhibited to the jury was the duplicate or copy delivered by Crews to Woden.

The other criticisms with respect to the introduction of this contract and its consideration by the jury and the instructions of the Court with reference thereto, are also without merit. It was stated by learned counsel that no effort was being made to recover upon the contract, but that he desired its introduction for the purpose of strengthening his contention that Crews, because of the existence of this contract, was morally persuaded that he should make the promise to Dr. Gould, and that he subsequently did so. We are of opinion that defendant in error was entitled to this evidence in corroboration of his theory. We overrule the 2nd, 15th and 16th assignments of error.

In the 3rd assignment it is insisted by Crews that the Circuit judge was in error in his exclusion of evidence

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tending to show that the troubles from which Woden was suffering and which necessitated an operation were of immoral origin and arose from vicious habits, and that Crews was not under any moral or legal obligation to provide medical aid. The predicate of the 4th assignment was the refusal of the Court to permit cross-examination of Dr. Gould as to the origin of Woden's trouble. In the 6th assignment it is said that the Court refused to permit evidence to the effect that Woden had been guilty of embezzlement of the funds of Crews. We do not believe that any reversible error was committed by the Court. The primary and controlling question kept uppermost during the trial was whether Crews in the early part of 1912 had promised Gould to pay the medical bill and hospital dues incurred for Woden. The cause of Woden's trouble was not material, nor could anything have been gained by allowing Crews to prove independently that Woden was guilty of embezzlement.

In the 7th assignment it is said that the Court erroneously refused to permit Crews to prove that he had deeded the property back to Woden and did not owe Woden a cent, but that on the contrary Woden was indebted to him. The basis of the 8th assignment was the refusal of the Court to allow Crews to prove that the contract between Woden and Crews was procured by fraud. In the 9th assignment it is said that the Court erroneously declined to allow Crews to prove the circumstances of the entering into of the contract and of the value of the property conveyed thereunder.

Before disposing of these questions it is requisite that we state that the matters of fraud complained of and the reconveyance of the property to Woden and the discovery of the exaggerated value of the property and the subsequent efforts of Crews to be relieved of the contract with Woden

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were brought to light and took place several months after the purported contract upon which Gould based his right of recovery. It is therefore plain that if Crews had entered into the contract with Gould unconditionally to pay his surgeon and hospital bill, developments long afterwards which showed Crews' lack of business judgment and the fraud practiced upon him, would not excuse him from observing his agreement with Gould. Hence evidence with respect thereto was immaterial. At all events, no prejudice resulted, in view of the restrictions upon the right of recovery which were laid down by the Court in his charge. The 7th, 8th and 9th assignments of error are overruled.

The 10th, 11th, 12th and 13th assignments of error are all to the effect that the Court committed error in failing to check arguments of counsel and in failing to withdraw them from the jury and in failing to sustain certain exceptions with respect to these arguments. In the 10th assignment it is said that the lawyer used this language: "If old man Woden had died when he was operated on, you would never have heard of this suit, or of the suit in Chancery." The bill of exceptions discloses that upon objection being made, the Court stopped this line of argument. The record does not disclose any repetition by counsel. We are therefore to presume that the attorney obeyed the suggestion of the Court and we are further bound to presume that the jury understood that the Court disapproved of this argument, and that they should not consider the matter. Conceding that the argument was improper, we believe that there was no just ground of complaint after this rebuke by the Court: *Baker v. Bates*, 4 Tenn., C. C. A. In the 11th, 12th and 13th assignments it is said that the attorney remarked that he felt like crying when he thought of how old man Woden had robbed

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and beat Crews out of \$4,000; that old man Woden was like putty in Crews' hands; that he was no match for him, etc. That it appeared from the evidence that Crews was trying to beat Woden out of \$1,700.00 and his labor for a year or more; that when Woden got sick Crews turned him out of doors, etc.

The bill of exceptions discloses that exceptions were made to these arguments, and that the Court was requested to withdraw the argument from the jury, but that he failed to do this, stating that he would instruct the jury with reference to the contract.

The discretion of the Court with respect to the line of argument will rarely ever be controlled; and it will be the basis of a new trial only when this discretion was clearly abused or when there was persistent conduct on the part of counsel in exceeding the bounds of argument and ignoring well recognized rules of practice to the prejudice of losing party: *Mfg. Co. v. Woodall*, 7 Cates, 605. We are not prepared to say that the line of argument pursued was wholly unjustified. It is not for the Courts to say what deductions favorable or unfavorable counsel may make from evidence adduced; and the only safe rule to announce is that if a line of argument has any sort of basis in the evidence the extent to which the trial judge will allow temperate comment is purely a matter of discretion which will not be reviewed by an appellate Court. In the next place, the record fails to disclose any persistency on the part of counsel in pursuing a course over the objection or the rulings of the Court and in defiance of the rules of practice. Owing to the silence of the record, we should rather presume that counsel obeyed every request by the Court to desist from his line of argument. Again, the record is not plain that the Court ruled the one way or the other upon the last objections that were made. Finally,

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treating the record as disclosing what took place, it shows that the trial judge promised to give the jury appropriate instructions about the contract between Woden and Crews. The Court in his general charge stated to the jury that they were to consider this contract as a circumstance only. If plaintiff in error desired any specific instructions for the purpose of neutralizing any particular line of argument which had been allowed to be made with the statement that reference would be made to it in the charge, it was incumbent upon appellant to call the attention of the Court to his failure so to have instructed the jury: *Donnelly v. Jackson Bros.*, 2 Tenn., C. C. A., 408.

In the 17th assignment it is said that the Court erroneously instructed the jury that if Woden was sent to plaintiff's hospital by Crews to be treated and cared for by him and agreed to pay for the same, or if plaintiff treated Woden at defendant's request, or if while said Woden was in the hospital Crews went to Gould and agreed with him that he would pay for the services rendered, then Crews would be liable.

The only reason urged by learned counsel for plaintiff in error for their insistence that the Court was wrong in this instruction is that there was no evidence upon which such a charge could be based. We shall confine them to the reason urged by them to the exclusion of all others: *Railway Co. v. Prince*, 2 Tenn., C. C. A., 688. A sufficient answer to this assignment of error is that there was material evidence calling for such an instruction. We overrule the 17th assignment. We do not comment upon the last part of the instruction criticised as imposing liability in contravention of the statute of frauds, as this was not insisted upon in the assignment made either on motion for a new trial or in the assignments made here.

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The basis of the 18th assignment is a remark said to have been made by the Court during the argument that Dr. Gould could have stated in the Chancery Court and fought his case out there and that Crews could have recovered from Woden the amount of the bill which he would have been held liable for to Gould. There is nothing in the bill of exceptions other than the motion for a new trial to show that the trial Court ever made such remark. Hence there is nothing upon which we can base any ruling with respect to the question presented: *Sherman v. State*, 17 Cates, 16.

In the 20th assignment it is said that the Court erred in failing to charge the jury that if Crews made a verbal promise to pay Woden's debt, there could be no recovery because of the statute of frauds. Two answers to this are ready. One is that the Court in substance told the jury that there could be no recovery unless credit was extended to Crews and unless Crews had promised to pay for the services. The Court further told the jury that if the contract was between Woden and Gould there could be no recovery, but that in order to justify a verdict the proof must show that there was a direct contract with Crews. The other answer is that if plaintiff in error desired further instructions he should have presented special requests.

Again, a promise to pay made by a party having funds in his hands is binding although not in writing.

In the 21st assignment it is said that the Court erroneously charged that it was the contention of Gould that he at the instance of Crews treated Woden and cared for him at his hospital, and that defendant had contracted with him to pay for such services. It is earnestly contended that there is no evidence upon which this statement could have been made. Our response to this assignment would

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be but a repetition of the grounds stated in disposing of assignment No. 22 and assignment No. 17.

We have given the various assignments of error extended and mature consideration and have been unable to discover any satisfactory reason for granting a new trial. It is true as we have remarked, that the evidence of a direct promise by Crews is not very strong; but its weight was a question for the jury in the first place and for the trial judge upon motion for a new trial. The judgment of the lower Court is affirmed with costs.

TERRY W. ALLEN V. TOM DAVIE.

Affirmed by Supreme Court, 1913.

1. **AUTOMOBILES.** *Approaching horse-drawn vehicles from rear.*

It is the duty of an operator of an automobile approaching horse-drawn vehicles from the rear to give timely notice and warning of their approach, and this is so whether or not the animals exhibit fright.

2. **SAME.** *Manner of passing such animals. Question for jury.*

Whether the operator of an automobile has given sufficient notice of his approach from the rear and whether he passes such animals in a prudent way and whether he gives sufficient space, are all questions for the jury, whether the suit be under the statute or common law.

3. **SAME.** *Duty of vigilance. Party chargeable with notice of things and conditions which ought to have been seen.*

The operator of an automobile on a highway is required to be vigilant, and he is chargeable with knowledge of all persons and conditions which a prudent and vigilant operator would have seen.

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4. PLEADING IN PRACTICE. *Variance. Personal injury case.*

Where a declaration charged that an automobile had run upon and injured plaintiff and the proof showed that the machine had frightened a mule hitched to a buggy in which plaintiff was riding and had thrown him out and injured him, there was no variance.

FROM MADISON COUNTY.

Appeal in error from Circuit Court of Madison County,
S. J. EVERETT, Judge.

W. G. TIMBERLAKE for plaintiff in error.

J. M. TROUT for defendant in error.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

This is a suit for injuries claimed to have resulted from the alleged wrongful and negligent operation of an automobile owned and driven by plaintiff in error while on one of the highways of Madison County in July, 1911. It was commenced before a Justice of the Peace, and thence appealed to the Circuit Court where a trial before His Honor, Judge Everett, and a jury resulted in a verdict in favor of defendant in error to the extent of \$183.00. Mr. Allen interposed a motion for a new trial. This was overruled and judgment was pronounced. He has appealed and assigns two errors, which may be considered together.

The first assignment is in substance that there is no material evidence to support the verdict. The second specification is that there was and is a fatal variance between the proof and the allegations of the warrant.

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The charge of the trial judge is not included in the bill of exceptions. We must therefore presume that it was correct in all its parts and that all the issues that were raised or could have been raised from the statements of the warrant and the proof were rightly submitted. The warrant is in the following words, omitting the caption and beginning:

“Summon Terry W. Allen—— to answer the complaint of Tom Davie wherefore in July, 1911, on public highway in Madison County, Terry W. Allen was running automobile No. 4681, to answer Tom Davie to his damage in the sum of \$499.00 for wrongfully, recklessly and wantonly running his automobile so near as to frighten and the sweep of the automobile scaring plaintiff's mule and also for running against, upon and over said buggy in which plaintiff was seated, knocking it out of the road and breaking said buggy, damaging it and damaging mule and running against and over plaintiff and crippling him in body, head and arms and legs and also running so closely to plaintiff Tom Davie, while he was in the buggy on a public highway while said Allen was running his automobile in a reckless and at a dangerous speed; run so close to plaintiff's buggy as to topple it and knock it out of the road and cause plaintiff's mule to turn said buggy over, throw plaintiff out of the buggy and cripple him in head, arms, body and legs and caused plaintiff to suffer mental and physical pain, loss of time, doctor's bill and cripple him for life without fault on the part of plaintiff, to plaintiff's damage under \$500.00.”

While hardly necessary, it may not be out of place for us to repeat some propositions well known to learned counsel in this cause, namely, that it is not for us to determine the credibility of the several witnesses, nor to admit or deny any inferences of fact which may or may not be suggested

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by the evidence, and that we must accept as binding and conclusive the finding of the jury upon any disputed issue of fact, however much we may deem it contrary to the greater weight of the evidence, if there be any material evidence to support the verdict; and further, that if the facts or contentions suggest two theories of fact, we must accept that one adopted by the jury.

The real contention of learned counsel for plaintiff in error, and it is ingeniously made and skilfully fortified by logic, is that the only possible theory sustainable or inferable from the evidence as to the cause of the accident is that of the frightening of the mule driven by defendant in error, and as the proof is conclusive that the plaintiff in error was not guilty of negligence in causing the animal to become frightened, and as there was no collision between the automobile and the buggy or with the person of the defendant in error, the finding of the jury must have been based upon a cause or theory which was either not set forth in the warrant, or if included therein, was not sustained by the proof.

There is evidence in the record tending to show the following: On a day in July, 1911, the defendant in error Tom Davie, a negro man about sixty years of age, was driving a four-year-old but gentle mule that was hitched to a small no-top buggy on the Trenton road some mile or two out of Jackson and going in a northern direction. He was driving in the rear of and very close to a two-horse or mule wagon that was moving just ahead of him. While ascending a hill Davie saw the mules ahead of him evince fright. He about the same time noticed that his own mule was becoming alarmed. Simultaneously with these observations or possibly some moments before this he heard an automobile approaching from the rear. He states that he heard no bell nor horn, but knew that the

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machine was coming. The driver of the team ahead turned to the right and to the outer edge of the road and Davie did likewise, each giving ample space or room for the passage of the automobile to the left, the testimony being that there was a space of some twenty feet to the left which could have been utilized by the operator of the machine. In some minute or two after thus turning to the right, the automobile passed on by like a rush of wind, as described by Davie, his mule in the meantime exhibiting fright and rearing and plunging. The result was that the buggy was thrown over and the defendant in error was pitched on or against a wire fence and severely injured. The left hind wheel of the buggy was splintered or shattered and one of the wheels on the right hand was broken or damaged. The mule became in some way detached from the buggy and ran across the road, but sustained no physical hurt. There is no direct testimony that the automobile struck the buggy; but we are not prepared to say that there was no impact. But we do not deem this feature entirely controlling. There is substantial evidence that the mule exhibited considerable fright and that its movements because of this frightened condition resulted in throwing defendant in error out and causing his injury. The toppling of the buggy was caused by one or the other of two happenings or conditions, namely, that of physical impact or collision with the automobile, or producing a state of fright or uncontrollability or suddenness of movement on the part of the mule that occasioned the overturning of the buggy.

We feel constrained to take the view that both of these theories or causes were fairly included in the averments of the warrant, and that the evidence tended to show both or either one, and that this would preclude us from disturbing the verdict whether we consider the case from the one assignment of error or the other.

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It is ingeniously pointed out that there was adduced no evidence to the effect that defendant in error gave the plaintiff in error notice of his desire to alight from the buggy and hold or unhitch the mule, and that in the absence of this showing Mr. Allen had the right to proceed on his way and to assume that the mule was under control or that stopping was unnecessary. It may be responded that under the Act of 1905, Chapter 173, it was the duty of the operator to slow down his machine upon approaching from the rear, and when it was discovered (or discoverable) that the mule was exhibiting fright to stop his machine for a time sufficient for such person or persons to alight. We interpret that statute as meaning that when the operator approaches from the rear he shall slow down his machine to that speed which would put the machine under his control whether the animal exhibits fright or not, and that he should give the party ahead notice by bell or horn of his approach, and that these things should be done whether the animal exhibits fright or not; and that with respect to the duty of stopping his machine *entirely* no such absolute duty arises unless the animal manifestly exhibits fright and uncontrollability or unless the driver or rider indicates a desire to alight and take hold of the animal or resort to some means of controlling the same. All of the above observations may not be entirely relevant to the case in hand, but the propositions are laid down for the purpose of emphasizing the fact that the machine must be slowed down when there is an approach from the rear whether the animals are exhibiting fright or not, and that the question as to whether the operator did by reducing his speed from fifteen miles an hour to thirteen miles an hour actually slow down his machine and exhibit that degree of care contemplated by the statute were questions to be considered by the jury. These remarks are also rele-

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vant to the question as to whether the operator who approaches from the rear exercises ordinary care and prudence in passing animals that are perceptibly frightened by running very closely to them without decreasing the noise of the machine or materially lessening the alarm producing attributes or capabilities thereof. They are also pertinent to the question as to whether the operator observed due care with respect to the distance or width of berth given the animal and vehicle which he is attempting to pass in a given case of fright which a sudden onrush was calculated to augment.

We have assumed in this case that the above theories clearly arise from the testimony. We find in the record evidence to the effect that defendant in error and his mule were visible for a hundred yards or more ahead of Mr. Allen and that he could have discovered at that distance that the mule was rearing and exhibiting alarm. It is not for us to determine whether this was true or not, as the jury evidently found against him. Taking these facts as found or inferable, we are impressed that the jury could predicate a further finding that plaintiff in error did not exhibit that degree of care contemplated by the statute.

It might have been more advisable for the draftsman of the warrant to have averred explicitly that Mr. Allen did not stop his machine entirely as required by the statute, but we are of opinion that he sufficiently indicated that he intended to rely upon violation of the statute and also the common law duties governing operators. We must not be understood as holding that the defendant in error was entitled to recovery because of failure to blow the horn or sound a bell, in view of the admission of defendant in error that he knew that the machine was approaching. We simply hold that there was evidence tending to show that Mr. Allen ran by the buggy at a considerable speed

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and that he ran close to it, and that he did not heed properly the situation or consequences of the exhibition of fright which the defendant in error and his witness testify was shown by the mule. It is needless to say that the operator of a machine is presumed to have seen that which would have been observed by him had he been on the look-out ahead, and that it was his duty to keep a vigilant look-out ahead for persons on the road and especially for those in vehicles to which animals are attached: *Cumberland Telephone Company v. Burns*, 1 Tenn. C. C. A., 179. We feel constrained to overrule the assignments of error and to affirm the judgment below. It is needless to say that if the jury were warranted in finding plaintiff in error guilty of negligence in operating his machine, and that this negligence augmented the fright of the mule and if this increased fright caused the mule to sidestep or lurch and topple the buggy over and injure plaintiff, all the consequences were chargeable proximately to this negligence, whether there was any impact or not.

Plaintiff in error will pay the costs.

W. J. BENNETT, ET AL. V. W. S. HARRISON, ET AL.

Writ of certiorari denied by Supreme Court, 1915.

1. HUSBAND AND WIFE. *Resulting Trust. Estoppel. Competency of Evidence as to Acts and Conduct of Husband.*

In suit by the heirs at time of a deceased husband to recover of the widow a parcel of land which she claims to have acquired from her husband it is competent for her prove by witnesses all the declarations and acts of the husband which tend to establish a resulting trust in favor of the wife or an estoppel of the husband to assert title against the wife.

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2. SAME. *Estoppel of Husband. Estoppel of Privies.*

Where a husband, by his conduct, declarations and acquiescence in the settlement upon the wife by investment a considerable sum of money and has then estopped himself to assert any right thereto, as husband or otherwise, his heirs will also be estopped, the wife having survived him.

3. SAME. *Settlement Upon Wife. Gifts from Strangers.*

Gifts of money to a wife from strangers to be expended upon lands owned by the husband upon an express agreement of the husband antecedent thereto that the land thus improved should become the property of the wife, estops the husband to claim that this did not create in the wife a technical separate estate.

FROM WILLIAMSON COUNTY.

Appealed from the Chancery Court of Williamson County, DOUGLAS WIKLE, Chancellor.

FAW & CROCKETT for complainants.

J. C. EGGLESTON and H. H. COOK for defendants.

MR. JUSTICE HIGGINS delivered the opinion of the Court.

Complainants, who assert that they are heirs at law of one Joseph W. Bennett, deceased, brought this bill against his remaining heirs at law and the devisees of his widow to recover a house and lot of the value of some \$2,500 situated in the town of Franklin, and to have a certain will and other claims removed as clouds upon the title. The devisees of Mrs. Bennett answered, setting up title in their testatrix by parol gift or purchase or by the statute of limitations or by estoppel. Proof was taken. At the hearing the Chancellor denied complainants any relief, and they are here assigning numerous errors.

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We shall dispose of the second assignment and its subdivisions first. We see no error pointed out by sections one, two, three, four, five and six and sub-section eight of this assignment. Conceding that the defendants might rely upon the defense of resulting trust or verbal gift or parol purchase or estoppel, all the testimony admitted, having reference as it does to transactions with the husband and his declarations and conduct, is competent from every standpoint. There is merit in sub section seven of this assignment, based as it is upon the alleged admission of the will of Mrs. Bennett; but this is not of sufficient moment to bring about any change in the disposition of the case.

Treating all the evidence as competent, we find succinctly the following facts: Joseph W. Bennett, some time prior to 1882 purchased a small lot in the town of Franklin for something over \$400 and erected thereon a small dwelling in which his wife and he lived for some time, he doing nothing and permitting his wife to earn money in different ways and using her earnings in defraying the expenses of the family. In 1882 their dwelling burned, together with some of its contents. At that time there was due as purchase money some hundred and fifty dollars. Bennett had no money nor property nor earning capacity. Friends of his wife went to him and told him that if he would relinquish all claim to the lot and treat it as the property of his wife they would secure subscription of money, materials and labor and replace the house. We find as a fact that the yielding of his interest in the property was one of the conditions upon which the money was to be subscribed and used. We find that the declarations of Bennett were equivalent to a promise by him that if the friends would restore the property it should become the property of his wife and that he would not assert any

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interest therein. Pursuant and subsequently to these communications friends of Mrs. Bennett subscribed expressly for her various sums aggregating five or six hundred dollars, which total was used in the erection upon the lot of the house which was in existence at the time this bill was filed. We find that this money was collected by or paid to Mrs. J. P. Helms as trustee for Mrs. Bennett and that it was handled expressly and exclusively for the benefit of Mrs. Bennett. We also find as a result of collections or negotiations or by the efforts of Mrs. Bennett, the vendor's lien note was endorsed to her and became her property. We also find that Bennett was of the persuasion that the lot would have to sell to the end that the purchase money note be paid, and that this view of it was one among other considerations which prompted him to make the agreement that if the house was replaced it should become the property of the wife, reserving to himself the right to live there during his natural life. From the year 1882 until the death of Bennett in 1896 he treated this property as belonging to his wife and frequently so declared. We find as a fact that Mrs. Bennett and her donating friends for that period of fourteen years from 1882 to Bennett's death considered and treated the house and lot as her own. She throughout those years made the living, paid the taxes and insurance and kept the place in repair. Bennett died in 1896 intestate and without issue. Mrs. Bennett survived him until 1912 during which year she died, leaving a will in which she disposed of the house and lot for life to Mrs. Maury, with remainder to certain other parties defendant. From the death of her husband until that of her own, Mrs. Bennett openly asserted her ownership of the house and lot; and we find that she expended substantial sums in enlarging the house and making substantial improvements, such as a childless widow claiming the property merely as

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homestead or dower would not have undergone. We find no opposition from any one to her claims. It is true that there is a failure to show that Mrs. Bennett brought home to the complainant actual knowledge that she was claiming the land in her own right; but it is quite singular that complainants, living short distances from her, were not aware of her adverse assertions. It is true that neither homestead nor dower was allotted and that the record title remained in her husband. But we are of the opinion that complainants should be repelled notwithstanding.

Our reasons for so holding are to be briefly stated. Equitable maxims will furnish the solution, in conjunction with well settled rules of law. If the husband forever estopped himself to claim this property as against his wife, his privies were and are also bound. Equity looks to the substance and not to the form of things and will treat as done that which ought in good conscience to have been performed. Equity is alert to enforce any arrangements that partake of the nature of a trust or of settlements, and will constitute a husband a trustee of the wife whenever necessary to meet the ends of justice.

We construe the arrangement between Bennett and the friends of his wife as an agreement upon his part to settle the house upon his wife, and this upon substantial considerations moving from the donors. We are of the opinion that the husband could not thereafter disavow this arrangement. Again, the gift of the money by friends to the wife was under such circumstances as in essence to amount to the creation of a separate estate in the wife. Moreover, the money certainly was the property of the wife, which the husband permitted her to receive and to treat as her own to the exclusion of his own rights. The subsequent investment of this money in the house amounted to the acquisition by the wife of a piece of real

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estate belonging to her alone; *Carpenter v. Franklin*, 89 Tenn., 148.

In addition, the husband contracting through Mr. and Mrs. Helms for his wife, virtually agreed that he would treat the real estate and its appurtenances as the property of the wife in consideration of the expenditure of the money in improvements. This amounted to a contract of sale by the husband to the wife enforceable in a Court of equity; *Templeton v. Twitty*, 88 Tenn., 595. At all events this amounted to either a sale or a gift, followed by more than twenty years possession. This should be held to have divested the husband of all title and to have estopped his privies from asserting any adverse claims.

The learned Chancellor denied complainants relief upon the ground that Mrs. Bennett had perfected her title by adverse possession. We do not predicate our holding expressly upon this feature. We do think it exceedingly strange that complainants were not aware of Mrs. Bennett's adverse holding. We are persuaded that they were. But owing to the finding of other satisfactory grounds of decision we do not treat this feature as of controlling importance. It is axiomatic that there cannot be any adverse holding as against remaindermen until the falling in of the life estate; and it might begenerally true that the holding of the widow would not be treatetd as adverse to the heir until actual notice of a hostile claim was brough into knowledge of the heir.

But we are of opinion that upon the grounds stated the Chancellor reached the correct result and his decree is affirmed with costs. *Covington v. McMurray*, 4 Tenn., C. C. A., 378.

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NATIONAL BEVERAGE Co. v. W. J. BUSH & Co.

Affirmed by Supreme Court, 1916.

1. **PRINCIPAL AND AGENT.** *Non-resident Principal. Service of Process Upon Soliciting and Traveling Agent. Acts 1887, Ch. 226.*

A non-resident principal is not brought into Court by service of process upon a mere soliciting traveling agent, where the principal has no local agency and is not doing business within the State.

2. **SAME.** *Doing Business Within State. Non-resident not When.*

A non-resident whose sole transaction consists of entertaining a proposition or order submitted through a soliciting agent is not transacting business within this State.

FROM HAMILTON COUNTY.

Appeal in error from the Circuit Court of Hamilton County, NATHAN BACHMAN, Judge.

TATUM, THACH & LYNCH for plaintiff in error.

W. B. MILLER and SMITH & BOWMAN for defendant.

SPECIAL JUSTICE R. H. SANSOM delivered the opinion of the Court.

This is an action by the plaintiff, a Georgia corporation which has become domesticated in Tennessee and which operates at Chattanooga, against the defendant, a New York corporation, brought under chapter 226 of the Acts of 1887 entitled "An Act to subject foreign corporations to suit in this state." The summons in the case, or

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so much thereof as is directly pertinent to the specific question to be determined, is in these words: "You are hereby commanded to summon W. J. Bush & Company, a foreign corporation doing business in Tennessee, and having an agent, H. F. Clark, now in Hamilton County, Tennessee, to appear before the Circuit Court, etc," This summons was execute by service thereof upon H. F. Clark as agent of and for W. J. Bush & Company, to whom was delivered a copy of the writ or summons. Notice was given the defendant company by plaintiff company that the suit had been brought as required by statute, accompanied by copy of the summons and the sheriff's return thereon, and the affidavit of the service by the officer is embodied in the record.

In this way the defendant, Bush & Company, was before the Court, if before the Court at all. It entered a special or limited appearance, solely and alone for the purpose of questioning the sufficiency of service of process, by plea in abatement, averring in the plea that it, Bush & Company, was at the time of the alleged service, and continuously since then had been, a corporation organized and doing business under the laws of the State of New York, that it was not at the time of said service nor has it since been doing business or maintaining an agency in Hamilton County, Tennessee, and that it had no agent upon whom valid service of process could be had in Hamilton County. The plea further avers that the process was served on one H. F. Clark, as the purported representative of defendant and that the service is void and of no effect, because the said Clark was, at the time of the commencement of the suit and the service of process on him, employed by defendant company only as traveling solicitor, to travel and solicit orders for goods, the orders to be transmitted to defendant company in New York subject

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to acceptance or rejection. On acceptance of such orders the goods were, according to the further averment of the plea, to be shipped from defendant's place of business in New York to points within the State of Tennessee. Clark was not therefore, an agent of the defendant company upon whom service of process against it could be legally made so as to bind it in the premises. This plea is verified by Charles Blair Leighton, treasurer of the defendant Company.

The plaintiff, National Beverage Company, on January 28th, filed its declaration alleging its right of recovery of damages for \$3,000.00 for misrepresentations of fact by the defendant company through its agent, one Bush, in respect of certain coloring matter ordered by the plaintiff company from the defendant company through said Bush, one of defendant's traveling salesmen. It is not deemed material to set out in detail the various averments of the declaration.

The plaintiff company on February 3, 1915, filed its replication to the plea in abatement of defendant company to the service of process. This replication avers that at the time the action was commenced the defendant company was doing business in Tennessee through H. F. Clark, its agent and representative for this territory, and that Clark at the time the action was commenced and at the time process in this suit was served upon him, was doing business in Hamilton County, Tennessee, for the defendant and that said Clark was the general representative of the defendant company engaged at the time in visiting various of its customers in Hamilton County, Tennessee, in connection with the business of defendant company, and was soliciting and taking orders from the trade generally in Hamilton County for goods to be shipped by the defendant company. This replication further avers

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that the transaction to which the suit relates and out of which it grew was had by the plaintiff and defendant in part within the State of Tennessee as set out in the declaration. To this replication the defendant company demurred, laying three grounds of demurrer: first, that the replication shows on its face that H. F. Clark, upon whom process was served, was not in fact doing business for defendant within the meaning of the statute under which service of process was attempted to be made in the case, but that said Clark was only soliciting and taking orders in Tennessee for goods to be shipped from one state to another; second, that it fails to aver that said cause of action arises out of or that this suit in any wise relates to any wise relates to any of said acts of said Clark done by him in Hamilton County or elsewhere in Tennessee; third, that it fails to aver that the cause of action arises out of any transaction had by defendant with persons in Hamilton County, or concerning any property in Hamilton County or elsewhere in Tennessee, through any agency acting for it in Hamilton County or elsewhere in Tennessee.

On July 13, 1915, upon application, the plaintiff was permitted to amend its replication to defendant's plea in abatement and by said amendment it alleges that the plaintiff is engaged in the manufacture of syrups for use in the soft drink bottling trade that in manufacturing such syrups it is necessary to use sugar coloring; that about October, 1913, an agent of the defendant company, one B. L. Warner, called upon plaintiff at its place of business in Chattanooga, and sought to induce it to purchase from defendant sugar coloring to be used in the manufacture of its syrups. The plaintiff alleges that it explained to said Warner, defendant's agent, the nature and character of syrups manufactured by it and explained to him the ab-

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solute necessity of using a sugar coloring that would not precipitate and become cloudy in the finished bottled drink, and the agent then and there assured plaintiff it would not have any trouble with the sugar coloring, and that it would not precipitate or cause the drink to become cloudy, but that the drink would hold its natural color. Plaintiff further alleges that, relying on these assurances made to plaintiff by said Warner, agent of defendant company, in Hamilton County, Tennessee, it agreed to purchase and did purchase from defendant considerable quantity of the coloring matter, but that the coloring matter furnished plaintiff by defendant under this alleged assurance, did not come up to the assurance made by said Warner, but precipitated in the bottled drink causing same to become unfit for use, thereby causing plaintiff damage and injury, for which damage this suit was instituted, as fully set out in the declaration. The amended replication concludes in these words: "Plaintiff therefore avers that this suit relates to transactions had in part in this state through said B. L. Warner acting for defendant W. J. Bush & Company within the State."

The demurrer of defendant to the replication of plaintiff was sustained and the replication stricken out, to which action plaintiff excepted. Thereupon plaintiff, National Beverage Company, joined issue on the plea in abatement and demanded a jury to try this issue. By leave of the Court the defendant was permitted to specially appear for the purpose of trying its plea in abatement, when, by consent of parties, a jury was waived and the issues arising on the plea in abatement were submitted to and tried by the Circuit judge without a jury. The issues were found by the Circuit judge in favor of defendant, and the plea in abatement was sustained and the suit dismissed at the cost of plaintiff. A motion for a new

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trial was entered upon two grounds. First, because the Court erred in sustaining defendant's demurrer to plaintiff's replication to the plea in abatement. Second, because there is no evidence to support the judgment of the Court. This motion for a new trial was overruled and this appeal is prosecuted from the final judgment of the Court dismissing the case.

FACTS.

It appears that in October, 1913, one B. L. Warner, a traveling solicitor of orders for the defendant, W. J. Bush & Company, appeared in Chattanooga and called upon the plaintiff, National Beverage Company, with a view of interesting it in the purchase of certain sugar coloring matter. The traveling salesman, Warner, had no authority under the proof in the case further than to solicit orders, which were either mailed by the customers direct to the company or furnished to Warner, the traveling salesman, to transmit to the defendant company for its acceptance or rejection. If accepted the goods were shipped from New York direct to the purchasing concern. It appears that the plaintiff company was engaged in the manufacture of certain syrups which were used in soft drink preparations and that it had to exercise care in order to avoid the use of syrups that would precipitate in the soft drink, because precipitation would depreciate the value and perhaps prevent the sale of the soft drink itself. It is shown that the plaintiff company explained this fact to the salesman Warner, and that Warner assured it that his company, the defendant, sold sugars that were as free from the tendency to precipitate as those sold by any other concern handling like goods. It is shown that this matter was fully explained to Warner, the traveling solicitor, that he stated to the plaintiff that the goods of his company, the

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defendant, would be up to the standard, and that thereafter plaintiff ordered the goods bought by it from the defendant company, direct from the company and not through defendant's agent.

It is further shown by the proof that the sugar in the goods so bought from defendant company did bring about the precipitation complained of, and the plaintiff asserts that as a result it suffered damage and loss. This suit was brought to recover the damages thus alleged to have been sustained.

It is further shown that Warner, the traveling salesman, a short while after he had solicited the plaintiff company for orders, retired from this territory, if not from the employment of defendant company, and that one H. C. Clark, who had no part in the original transaction, or alleged warranty of Warner, upon which this action is based, was substituted as traveling solicitor of defendant company to this territory. It was upon Clark, the substituted solicitor for the defendant company, that the service was had in this case.

It is clear from the proof that no order was given by the plaintiff to Warner, the soliciting salesman, but that he simply attended to the trade, calling upon the plaintiff among others. Orders resulting from his solicitations as a traveling salesman, were however, sent direct to the defendant company and that the orders were really filled through the correspondence which is filed with and made a part of the record in this case. These orders and their acceptance were by letter and the shipments were made from New York.

It is further shown that the defendant never at any time maintained any species of agency in Tennessee and had no business house in Tennessee. It is clear and undisputed from the record that the defendant company's

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instructions to its traveling salesmen were to the effect that they should not receive or pretend to take any order for goods in Tennessee except subject to the approval of the defendant company at its principal place of business in New York. A number of orders are shown to have been forwarded by the plaintiff company to the defendant company for its goods covering a period of perhaps some months.

The present differences between the parties grew out of the precipitation complained of in the soft drink products. As a result of the correspondence between the plaintiff and the defendant, set out in the record, the plaintiff company, on May 23, 1914, remitted to defendant company its check for \$203.00, and returned certain coloring matter to balance the account outstanding between the parties, and thereafter instituted this action in Tennessee under the facts and pleading as hereinbefore set out in substance.

The sole question for determination in the case is whether or not under these facts and circumstances the traveling solicitor of the defendant company was such an agent as that service of process could be had on him in Tennessee that would bind defendant, a non-resident corporation having no place of business or office or agency in Tennessee, but represented in the State by traveling salesmen only. This question must be determined under a construction of chapter 226 of the acts of 1887 entitled "An act to subject foreign corporations to suit in this state." In our view of the matter it has been passed upon and definitely settled by the Supreme Court of Tennessee. Mr. Justice McAlister, in passing upon this act, said:

"The Act of 1887, Ch. 226, which the Court held authorized the service of process on James Witherspoon, former agent, was intended to enlarge the provisions of the Code regulating the service of process on foreign corpora-

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tions having an officer or agent and a resident local agent in the county in which suit is brought. The Act of 1887 provides that any non-resident corporation 'found doing business in this State shall be subject to suit here, so far as relates to any transaction had in whole or in part in this State, or any cause of action arising here, but not otherwise.' The second section defines what is meant by 'being found doing business in this State as embracing any transactions with persons, or having any transaction concerning any property situated in this State through any agency whatever acting for it within the State.' The Act of 1887 further provides that it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time the transaction out of which the suit arises took place, eac. This Act was held constitutional by this Court in the case of *Life Ins. Co. v. Spratley*, 99 Tenn., 322. See also *Telephone Co. v. Turner*, 88 Tenn., 265. The proof shows that T. G. Witherspoon, the general agent of this company at the time the policy was issued, and James Witherspoon, who wrote it, remained in Nashville during the entire year 1895, although disassociated from said company after December 31, 1894. But it is insisted by counsel for plaintiff that the Circuit Court erred in holding that the defendant company could be served with process under the Act of 1887, Ch. 226; that, in order to come under the provisions of the Act of 1887, not only must the foreign corporation be found doing business in this State, but this business must be done through some agency for it within the State that the foreign corporation must have an agent within the State transacting its business for it. This Act of 1887 has been held by this Court to apply only to foreign corporations found doing business in this State. *Telephone Co. v. Turner*, 4 Pickle,

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265; *Life Ins. Co. v. Spratley*, 15 Pickle, 322. In the former case it was said 'the Code provisions covered every case where the foreign corporations had a local office and resident agent. It did not cover the case of a corporation having no resident agent, but doing business through or by means of traveling agents. The Act of 1887 does not apply to foreign corporations having resident agents in the county where suit is brought.' But, while this is true, the Act clearly contemplates that the foreign corporation must be 'found doing business' in this State with persons or concerning property, no matter how slight. It does not appear that this company was found transacting any business in this State during the year 1895, and hence we think the Circuit judge was in error in holding that her vice of process might have been had on James Wither- spoon under the provisions of the Act of 1887." *Guthrie v. Indemnity Association*, 101 Tenn., 643 (650.)

And again in an opinion handed down by the Supreme Court speaking through Chief Justice Beard:

"Nor do we think the second proposition, when applied to the facts of the case, sound. That these foreign corporations were, in a sense, 'doing business' in this State through their traveling soliciting agents, is true;; and service upon the latter in all cases falling within sections 1 and 2 of the act of 1887, which we are considering, would probably bring them into our Courts. But the vice in the proposition is found in that the facts alleged in the pleas, and shown in the evidence, put the case outside the provisions of the statute, as we have already undertaken to establish. Hence, it is that, as 'the cause of action' did not arise from 'any transaction with persons' or 'concerning any property situated in this State through any agency whatever acting' for this corporation 'within the State' service on these agents did not give the Circuit

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Court jurisdiction of the cause." *Railroad v. Richardson*, 121 Tenn., 448. (458.)

It may be said that this latter case in its facts has no kinship to the case in hand; nevertheless the suit in that case was based upon the same act of the legislature, and the opinion of the Court was in construction of the provisions of this act. One or the other of several things must exist as condition precedent to any liability based upon which service may be secured and jurisdiction obtained and a recovery be had under the provisions of this act. One basis of liability is that the foreign corporation be found "doing business in this state." Clearly under the facts of this case the defendant Bush & Company was not "doing business" in the state in contemplation of the statute; the orders were taken for the goods in New York and the shipments were made from New York. If it is not found "doing business" in the state it may be held liable because the transactions complained of concern or relate to property situated in the state. Clearly under the facts of this case there is no "property situated" within the state that constitutes any part of the subject matter in controversy. If a foreign corporation shall have any transaction in this state through any agency in this state then the suit perhaps might be maintained where service of process was had or secured upon the "agency" acting for the foreign corporation within this state in the transaction complained of; but clearly no such agency as is contemplated by the terms of the statute existing in Tennessee under the facts developed. There can be no question in mind of the Court but that a traveling salesman or solicitor for a foreign corporation, a man employed for no purpose other than to solicit orders which he cannot accept, and which are mere orders or propositions of purchase sent direct to the house in New York subject alone

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and exclusively to *its* acceptance or rejection and with which the traveling solicitor has absolutely nothing to do, cannot be or constitute an agent, within the purview of the statute, upon whom service of process may be had, he not having had any part in the sale and purchase constituting the subject matter of complaint. The plaintiff in this case substantially contends that foreign corporations whose soliciting traveling men are without power to accept orders or make sale, and whose compensation may be based upon a commission upon sales resulting from their solicitations, may be bound by such traveling men, and held liable in damages on service of process upon such traveling men, for any sort of misrepresentation or guarantee which such traveling men may enter into with possible customers without any knowledge or authority from or on the part of the employing corporation. To construe the act to permit such traveling solicitors, having no authority under their contracts of employment, so to bind their principal, and subject their principal to damages for a breach of contracts attempted to be made without authority, would be utterly repellant and destructive, and ruinous to the business interests of the state. The better class of non-resident business corporations would not subject themselves to such hazards and would be forced in self-protection to withdraw from the state and leave competition along their lines among the irresponsible or less desirable class. The construction contended for is not borne out by the terms of the act itself. It is not founded in sound business policy or principle and does not meet the sanction or approval of this Court.

In our judgment the Circuit judge was entirely correct in his conclusions reached in the case and his judgment is affirmed with costs.

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